TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 538

HARRY SEMLER, APPELLANT,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

FILED NOVEMBER 23, 1934.

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[fols. 1-3]

IN SUPREME COURT OF OREGON

HARRY SEMLER, Appellant,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, CARRIE H. JENKINS, ARTHUR F. WEEKS and M. C. HARRIS, Members of the State Board of Dental Examiners, Respondents

STIPULATION AS TO RECORD—Filed Oct. 25, 1934

It is hereby stipulated and agreed by and between the respective parties hereto that the record on appeal of the above entitled cause to the Supreme Court of the United States, to be made up by Mr. Arthur S. Benson, Clerk of the Supreme Court of the State of Oregon, shall consist of the following:

Complaint filed by Harry Semler, plaintiff, in the lower court;
Demurrer filed by defendants thereto;
Order entered by Judge Lusk sustaining defendants' demurrer; and Judge Lusk's opinion;
Opinion by the Supreme Court of Oregon on appeal;
Date petition for rehearing was filed;
Date petition for rehearing was denied;
Mandate of Supreme Court of Oregon.

Senn & Recken, of Attorneys for Appellant. Herzog, Kenin & Kenin, Attorneys for Respondents.
Dated October 24, 1934.

[File endorsement omitted.]

[fol. 4] IN CIRCUIT COURT OF MULTNOMAH COUNTY

HARRY SEMLER, Plaintiff

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, CARRIE H. JENKINS, ARTHUR F. WEEKS and M. C. HARRIS, Members of the State Board of Dental Examiners, Defendants

COMPLAINT—Filed June 8, 1933

[File endorsement omitted]

Comes now the plaintiff above named, and, for cause of suit against the defendants above named, alleges:

I

That the defendant, Oregon State Board of Dental Examiners, was and is a board duly organized, existing and doing business under and by virtue of Section 68-1001, Oregon Code; That defendants above named, L. A. Rosenthal, Leonard R. Andrews, Carrie H. Jenkins, Arthur F. Weeks and M. C. Harris, were and now are duly appointed members of the said Oregon State Board of Dental Examiners, duly appointed by the Governor of the State of Oregon; that said defendants have duly qualified as members of said Board by taking and subscribing the oath in the manner provided for by Section 68-1002, Oregon Code, and have ever since been and now are the duly appointed, qualified and acting members of the said Oregon State Board of Dental Examiners.

II

That on the 6th day of June, 1918, the Oregon State Board of Dental Examiners duly issued to plaintiff, Harry Semler, a certificate which licensed the plaintiff, Harry Semler, to practice dentistry in the State of Oregon, which [fol. 5] certificate is now in full force and effect; that upon the issuance of said certificate the plaintiff entered upon the practice of dentistry in the State of Oregon and has ever since been continuously and is now engaged in the practice of dentistry under and by virtue of said certificate and

license; that prior to the issuance of said certificate the plaintiff duly complied with each and every of the requirements of the statutes of the State of Oregon governing the licensing of persons desiring to practice dentistry in the State of Oregon; that plaintiff has duly paid to the Secretary of State Board of Dental Examiners each year, from the issuance of the said license as aforesaid to the present time, the license fees at the time and in the manner provided by statute, and did receive each year the receipt or certificate of the Secretary of the State Board of Dental Examiners therefor, and did display each and every of said annual receipts or certificates in a conspicuous place in his office.

III

That from the time of the issuance of said certificate and license as aforesaid to the present time the plaintiff has practiced dentistry and maintained his office therefor in the County of Multnomah, State of Oregon; that plaintiff duly filed his certificate for record in the office of the County Clerk and Recorder of Multnomah County, Oregon, and said certificate was duly recorded.

IV

That there is now in full force and effect a statute in the State of Oregon, being Section 68-1013, Oregon Code, providing for the revocation or suspension of the license of dentists by the State Board of Dental Examiners, which statute is in words and figures as follows:

"Sec. 68-1013. Suspension and Revocation of License, Grounds, Hearing, Appeal. Any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction or a certified copy thereof, certified by the clerk of the court or by the judge in whose court the conviction is had, shall be conclusive evidence.

[fol. 6] 2. For renting or loaning to any person his or her license or diploma to be used as a license or diploma of such person.

3. For unprofessional conduct, or for gross ignorance or inefficiency in his profession. Unprofessional conduct shall mean "employing what are known as 'cappers' or 'steerers' to obtain business; the obtaining of any fee by fraud or misrepresentation; wilfully betraying professional secrets; employing directly or indirectly any student or any suspended or unlicensed dentist to perform operations of any kind, or to treat lesions of the human teeth or jaws, or correct malimposed formations thereof; the advertisement of dental business or treatment or devices in which untruthful and misleading, improbable or impossible statements are made; or habitual intemperance or gross immorality. The proceedings under this section may be taken by the board from the matters within its knowledge, or may be taken upon the information of another; provided, however, that if the informant is a member of the board, the other members of said board shall constitute the board for the purpose of finding judgment of the accused. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem it sufficient, make an order setting the same for hearing, and requiring the accused to appear and answer it at said hearing, at a specified time and place, and the secretary shall cause a copy of the order and of the accusation to be served upon the accused at least ten (10) days before the day appointed in the order for said hearing. The accused must appear at the time appointed in the order and answer the charges and make his defense to the same, unless for sufficient cause the board assign another day for that purpose. If he do not appear the board may proceed and determine the accusation in his absence. If the accused plead guilty or refuse to answer the charges, or, upon the hearing thereof, the board shall find them or any of them true, it may proceed to a judgment of either revoking his license or suspending it. The board and the accused may have the benefit of counsel, and the board shall have power to administer oaths, take the depositions of witnesses in the manner provided by law in civil cases and compel them to attend before it in person the same as in civil cases, by subpoena issued over the signature of the secretary and the seal of the board and in the name of the people of the state of Oregon. Upon the revocation of any license the fact shall be noted upon the records of the board of dental examiners and the license

[fol. 7] shall be marked as canceled upon the date of its revocation. The secretary of the board shall, upon judgment of suspension or revocation being entered, transmit to the county recorded wherein the license of the licensee affected by such judgment is recorded a copy of such judgment order, certified to as such by said secretary of the board, for record, and the same shall be recorded in the same manner and in the same book wherein is kept the record of the certificate to practice dentistry. In case of the revocation of a license by the said board the licentiate whose license shall have been revoked by the said board shall have the right to appeal from said revocation within thirty days of the cancellation of said license. Such appeal shall be to the circuit court in and for the county in which was held the meeting of the board in which such revocation was made. In case a person desires to take such appeal, he shall serve, or cause to be served, upon the secretary of said board, a written notice of such appeal, which shall contain a statement of the grounds of such appeal, and shall file in the office of such secretary an appeal bond with good and sufficient surety, to be approved by such secretary, to the state of Oregon, conditioned for the speedy prosecution of such appeal and the payment of such costs as may be charged against him upon such appeal. Said secretary, within ten days after the service of said notice of appeal, and the filing and approval of said bond, shall transmit to the clerk of the circuit court, to which said appeal is taken, a certified copy under the seal of said board of accusations on which the revocation was based, the ground for appeal, together with the notice and bond of appeal. The clerk of such court shall thereupon docket such appeal causes and they shall be tried in all respects as ordinary civil actions and like proceedings shall be had thereon. Upon such appeal said cause shall be tried de novo. Either party may appeal from the judgment of this circuit court to the supreme court in the manner as civil actions may be appealed thereto. The judgment shall be stayed from the date of the approval of said bond until final determination of said appeal."

V

That at the 1933 session the Legislature of the State of Oregon passed a pretended law which was approved by the Governor on March 1, 1933, and filed in the office of the Secre-

tary of State on March 1, 1933, known as Chapter 166 of the Laws of 1933, pretending to amend the provisions of the aforesaid Section 68-1013, Oregon Code, which pretended law is in words and figures as follows:

[fol. 8] "Section 2. That section 68-1013, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

Sec. 68-1013. Any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes:

1. His conviction of a felony or misdemeanor, involving moral turpitude, in which case the record of conviction or a certified copy thereof, certified by the clerk of the court or by the judge in whose court the conviction is had, shall be conclusive evidence.

2. For renting or loaning to any person his or her license or diploma to be used as a license or diploma of such person.

3. For unprofessional conduct, or for gross ignorance or inefficiency in his profession. Unprofessional conduct shall mean employing what are known as 'cappers' or 'steerers' to obtain business; the obtaining of any fee by fraud or misrepresentation; wilfully betraying professional secrets; employing directly or indirectly any student or any suspended or unlicensed dentist to perform operations of any kind, or to treat lesions of the human teeth or jaws, or correct malimposed formations thereof; making use of any advertising statements of a character tending to deceive or mislead the public; advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly; or habitual intemperance or gross immorality. The proceedings under this section may be taken by the board from the matters within its knowledge, or may be taken upon the information of another; provided, however, that if the informant is a member of the board, the other members of said board

shall constitute the board for the purpose of finding judgment of the accused. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem it sufficient, make an order setting the same for hearing, and requiring the accused to appear and answer it at said hearing, at a specified time and place, and the secretary shall cause a copy of the order and of the accusation to be served upon the accused at least 10 days before the day appointed in the order for said hearing. The [fol. 9] accused must appear at the time appointed in the order and answer the charges and make his defense to the same, unless for sufficient cause the board assign another day for that purpose. If he do not appear the board may proceed and determine the accusation in his absence. If the accused plead guilty or refuse to answer the charges, or, upon the hearing thereof, the board shall find them or any of them true, it may proceed to a judgment of either revoking his license or suspending it. The board and the accused may have the benefit of counsel, and the board shall have power to administer oaths, take the depositions of witnesses in the manner provided by law in civil cases and compel them to attend before it in person the same as in civil cases, by subpoena issued over the signature of the secretary and the seal of the board and in the name of the people of the state of Oregon. Upon the revocation of any license the fact shall be noted upon the records of the board of dental examiners and the license shall be marked as cancelled upon the date of its revocation. The secretary of the board shall, upon judgment of suspension or revocation being entered, transmit to the county recorder wherein the license of the licensee affected by such judgment is recorded a copy of such judgment order, certified to as such by said secretary of the board, for record, and the same shall be recorded in the same manner and in the same book wherein is kept the record of the certificate to practice dentistry. In case of the revocation of a license by the said board the licentiate whose license shall have been revoked by the said board shall have the right to appeal from said revocation within 30 days of the cancellation of said license. Such appeal shall be to the circuit court in and for the county in which was held the meeting of the board in which such revocation was made.

In case a person desires to take such appeal he shall serve, or cause to be served, upon the secretary of said board a written notice of such appeal, which shall contain a statement of the grounds of such appeal, and shall file in the office of such secretary an appeal bond with good and sufficient surety, to be approved by such secretary, to the state of Oregon, conditioned for the speedy prosecution of such appeal and the payment of such costs as may be charged against him upon such appeal. Said secretary, within 10 days after the service of said notice of appeal, and the filing and approval of said bond, shall transmit to the clerk of the circuit court, to which said appeal is taken, a certified copy under the seal of said board of accusations on which the revocation was based, the ground for appeal, together with the notice and bond of appeal. The clerk of such court shall thereupon docket such appeal causes and they shall be tried in all respects as ordinary civil actions and like proceedings shall be had thereon. Upon such appeal said cause shall be tried de novo. Either party may appeal from the judgment of this circuit court to the supreme court in the manner as [fol. 10] civil actions may be appealed thereto. The judgment shall be stayed from the date of the approval of said bond until final determination of said appeal."

VI

That the law passed by the 1933 session of the Oregon Legislature will go into effect, under a provision of the Constitution of the State of Oregon, on June 9, 1933.

VII

That during all the time that plaintiff has been engaged in the practice of dentistry as aforesaid, plaintiff advertised his occupation and his business in the daily newspapers and other periodicals and by means of signs displayed on the windows and walls on the outside of the building in which he maintains his offices; that in said advertisements plaintiff represented his professional skill and ability; that he exercised his profession and occupation with a high degree of efficiency; that he had acquired superior skill and ability and knowledge in the practice of dentistry and his ability to perform the professional services of dentistry in a superior manner; that he also represented in said advertisements the prices that he would

charge for various services to be rendered; that some of the advertising was by means of large display signs, glaring light signs, and plaintiff used in connection with said advertisements pictures or illustrations of a tooth, teeth and bridge work; that in connection with said advertising he employed the services of advertising solicitors who are engaged in the business of advising and counseling and writing advertisements; that plaintiff in said advertisements represented that he makes examinations for prospective patients without making any charge therefor; that in said advertisements he represented and represents that he guarantees all dental work performed by him, and represents that dental operations are performed painlessly, and that plaintiff has conducted for a long period of time and now conducts this type of advertising.

[fol. 11] VIII

That plaintiff has developed and acquired a very high degree of skill and ability in the practice of his profession of dentistry, in every branch thereof, which is superior to the ability of the great majority of practicing dentists, which superior ability has been acquired by a long and extensive training afforded by a very large practice; that by reason of the advertising practices referred to above plaintiff has acquired a very large business with a very large number of patients; that during the period of time that he has practiced his profession of dentistry he has treated directly, and there have been treated by his assistants under his supervision, approximately seventy-five thousand patients; that there are now being treated at his office approximately 150 patients daily who are treated by plaintiff and by assistants under the direct supervision of the plaintiff; that all assistants employed by plaintiff in his offices have always been duly licensed dentists holding certificates issued by the Oregon State Board of Dental Examiners; that all of the assistants employed by plaintiff at all times were selected with the highest degree of care and attention as to their ability to practice dentistry, and all employees selected did possess a very high degree of ability in the performance of all dental operations and were and are capable of and do render superior dental services; that by reason of the large volume of business done by the plaintiff as aforesaid it has become possible

for him to standardize office management and operations, to purchase supplies and materials necessary for use in dental operations in large quantities and at prices a great deal lower than dentists who are obliged to buy in small quantities; that by reason of the vast amount of business performed plaintiff has been able to establish a uniform schedule of prices for the great majority of dental operations to be performed.

IX

That plaintiff's ability to standardize prices and to ad- [fol. 12] vertise fixed prices for certain definite dental operations is due to the fact that the prices of materials used in dental operations and in the manufacture and supplying of false teeth, bridge work and dental plates are standardized in the market; that the materials purchased by plaintiff for use in his dental operations are always the very best and of the highest quality obtainable in the market; that by reason of the aforesaid facts plaintiff is enabled to represent truthfully, honestly and in good faith to the public by means of the advertisements that he possesses superior professional skill and ability in the performance of all dental operations involved in the practice of dentistry; to represent truthfully, honestly and in good faith that he will perform certain dental operations at certain fixed prices, and to represent in said advertisements truthfully, honestly and in good faith that he will guarantee all dental services performed by him or under his supervision and to represent in said advertisements truthfully, honestly and in good faith his ability to perform dental services painlessly, and that all advertisements utilized by plaintiff whether in the public press or periodicals or by means of signs of all kinds, have always been and now are absolutely truthful and made in good faith with the intention of carrying out each and every of the representations contained therein.

X

That by resorting to advertising of the type and in the manner described above, plaintiff has been enabled to build up a very large and lucrative practice with a large number of patients, and by reason thereof it has become possible for plaintiff to reduce the price of dental service to the

public continuously to a very material extent, and plaintiff has thereby made it possible for a great many people to obtain needed dental services and attention, treatment and service who would otherwise have been unable to obtain the same if they were obliged to pay prices that must be charged by dentists whose practice is limited to but a small number of patients; that the plaintiff's practice of advertising in the manner described above has enabled him [fol. 13] to render a very great and beneficial public service which has been and is of great benefit to the health, comfort and happiness of a great number of people who otherwise would have been deprived of the aid and assistance of competent and skilled dentists.

XI

That without the practice of advertising in the manner described herein, it would have been and is impossible to build up a large practice so as to enable a dentist to affect the economies in operation that would enable the plaintiff or any other dentist to render a high class of dental service at a very low price so as to make it possible for even the poorest people to obtain proper and adequate dental service.

XII

That obedience to and enforcement of the pretended statute adopted at the 1933 session of the Legislature, as aforesaid, would deprive the people of the State of Oregon of the benefits to be derived from the use of advertising practices referred to herein.

XIII

That by means of the type of advertising referred to herein plaintiff has built up and established a very lucrative and profitable business, with a large following; that he has expended a very large sum of money in said advertising; that if the aforesaid amended statute is enforced plaintiff's business will be destroyed or very materially impaired.

XIV

That pursuant to the aforesaid practices of advertising plaintiff has entered into a contract with the Oregon Neon

Corporation by the terms of which the said Oregon Neon Corporation constructed and hung upon the outer walls of plaintiff's offices a large Neon illuminated sign advertising the plaintiff's business in the manner referred to above; that by the terms of said contract plaintiff has obligated himself to retain said sign for a period of forty-four [fol. 14] (44) months from October 1, 1932, and to pay therefor the sum of Fifty Dollars ($50.00) per month during the entire period of said term; that the amended law referred to above, if enforced, will render the signs referred to herein useless and unlawful; plaintiff will be compelled to remove and destroy the same and will thereby be deprived of his property without due process of law.

XV

That pursuant to the advertising practices followed by plaintiff, as aforesaid, plaintiff has entered into binding and enforcible contracts with newspapers published in the City of Portland, to-wit: The Oregonian, Daily Journal, and the News-Telegram, to use a definite amount of space for advertising purposes for a period of time having a year to run from the date hereof, and plaintiff has obligated himself by said contracts to pay therefor; that when said amended law becomes effective and the same is enforced it will become unlawful for plaintiff to utilize the space contracted for with said newspapers in the manner provided for herein; that by reason thereof the said act unlawfully impairs the obligation of the said contracts and deprives the plaintiff of property without due process of law.

XVI

That pursuant to the advertising practices followed by plaintiff, as aforesaid, plaintiff entered into a lease for his offices in the building known as the Alisky Building, in the City of Portland, Multnomah County, Oregon, which is located at the Northwest corner of Morrison and Third Streets in said City, on the first floor thereof; that said location was selected by plaintiff because it is a thickly populated neighborhood and a much travelled district; that plaintiff made a lease for said space for a period of ten (10) years, which lease has still approximately forty-four (44) months to run from the present time; that the said lease was made because of its strategic location for advertising

purposes; that by reason of the said location plaintiff was [fol. 15] compelled to and did obligate himself to pay a very high rental for said office space; that when the said amended act goes into effect and the same is enforced plaintiff will be compelled to remove the advertising signs placed thereon and the location will become valueless to the plaintiff as a means of attracting the attention of the public to the representations contained on said signs, and by reason thereof the passage and enforcement of said act will constitute an unlawful impairment of the obligation of plaintiff's contract and will operate to deprive plaintiff of property without due process of law.

XVII

That by reason of the advertising practices referred to above and the development of plaintiff's business as a result thereof, plaintiff was compelled to and did establish large offices and laboratory and entered into contracts of employment with a large number of assistants; that when said pretended act goes into effect and the same is enforced the business of the plaintiff will as a result thereof become greatly diminished to such an extent that he will be compelled to abandon the equipment and offices established as aforesaid, the property contained therein will become useless and he will be compelled to breach the contracts entered into with employees as aforesaid and to discharge the same, and by reason thereof the passage and enforcement of said pretended act will result in impairment of the obligation of plaintiff's contract with said employees and will unlawfully deprive plaintiff of property without due process of law.

XVIII

That the aforesaid amended act adopted at the 1933 session of the Oregon Legislature is referred to herein as the "pretended act" for the reason that the same is unconstitutional and void, violating the Constitution of the United States and also the Constitution of the State of Oregon, in that the said statute deprives the plaintiff of property without due process of law, impairs the obligation of plaintiff's [fol. 16] contracts, constitutes class legislation, and is so indefinite and uncertain as to be incapable of enforcement, and denies to the plaintiff the equal protection of the law.

XIX

That the specific portion of said act which plaintiff claims to be unconstitutional and void is the portion thereof reading as follows, to-wit:

"advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly;"

XX

That the performance of any of the acts described in the said portion of the amended statute has no relationship whatsoever to the health, morals, safety or peace of the public at large; that it has no relationship whatsoever and has no tendency to regulate the skill, attention and ability of the plaintiff or of any dentist practicing dentistry in the State of Oregon, and said provisions are therefore arbitrary, abusive and discriminatory.

XXI

That said pretended law is unconstitutional and void because it violates and contravenes the provisions of the Constitution of the United States and the Constitution of the State of Oregon in the following respects, to-wit:

(a) The said pretended law attempts to deprive plaintiff of his property without due process of law and in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States, which provides that no state shall deprive any person of propetry without due process of law.

(b) The said pretended law attempts to impair the obli-[fol. 17] gations of plaintiff's contracts in violation of Section 10, Article 1 of the Constitution of the United States and of Section 21, Article I of the Constitution of the State of Oregon.

(c) The said pretended law attempts to deny to plaintiff the equal protection of the laws in violation of Section k. Article 14 of the Amendments to the Constitution of the United States.

(d) That said pretended law violates the provisions of Section I, Article 14 of the Amendments of the Constitution of the United States which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(e) That the said pretended law attempts to impose unreasonable and unlawful restrictions upon the exercise of the plaintiff's profession of dentistry and thereby affect his property right therein.

XXII

That each of the defendants does now publically declare, and publish that said pretended law is valid and enforcible, and said defendants now publically threaten and declare that they will enforce said pretended law and all the provisions thereof from and after the date that it becomes effective, and that they will thereupon institute proceedings for the revocation of the license to practice dentistry of anyone who violates the provisions of said pretended act.

XXIII

That unless defendants are restrained and enjoined from instituting and prosecuting any proceedings during the pendency of this suit for a permanent injunction, defendants will institute and prosecute a proceeding for the revocation of plaintiff's license to practice dentistry, if he should continue the practice of advertising in the manner hereinabove set forth, and he will thereby be caused irreparable damage and injury.

XXIV

That said pretended law should now be declared uncon- [fol. 18] stitutional and void, and defendants should now be enjoined and restrained from enforcing said pretended law on and after June 9, 1933.

XXV.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays for a decree declaring Chapter 166 of the Oregon Laws of 1933, in so far as it defines unprofessional conduct to be as follows:

"advertising professional superiority or the performance of professional service in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign, or containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service; or to perform any dental operation painlessly;"

and authorize the revocation of the license of a dentist who is guilty of any of the acts referred to above, and that the defendants, and each of them, be permanently enjoined and restrained from enforcing the aforesaid provisions of the said statute, and from instituting and prosecuting, or causing to be instituted or prosecuted, or to entertain any proceeding instituted by anyone else for the purpose of revoking the license of the plaintiff upon the grounds specified in the foregoing portion of the statute, and that pending the determination of this suit and the entry of a final decree herein, a temporary injunction be issued to restrain the defendants from enforcing the provisions of said statute, and that they be allowed their costs and disbursements incurred herein and for such other and further relief as to the Court may seem just and proper.

S. J. Bischoff, Frank J. Lonergan, Attorneys for Plaintiff.

[fol. 19] *Duly sworn to by Harry Semler. Jurat omitted in printing.*

[fol. 20] [File endorsement omitted]

[Title omitted]

IN CIRCUIT COURT OF MULTNOMAH COUNTY

DEMURRER—Filed June 19, 1933

Come now the defendants and each of them in the above entitled cause and demur to the plaintiff's complaint upon

the ground and for the reason that said complaint does not state a cause of suit against the defendants or against any of them. In support of said demurrer defendants rely upon Section 1-605 of the Oregon Code Annotated.

In our opinion said demurrer is well founded in law and the same is not filed for purposes of delay.

Herzog and Kenin, and Harris, Smith & Bryson, Attorneys for Defendants.

Due and legal service of the foregoing by receipt of a duly certified copy thereof, as required by law, is accepted in Multnomah County, Oregon, on this — day of June, 1933.

S. J. Bischoff, of Attorneys for Plaintiff

[fol. 21] [Title omitted]

IN CIRCUIT COURT OF MULTNOMAH COUNTY

ORDER SUSTAINING DEMURRER—Oct. 19, 1933

The above cause having duly come on for hearing on defendants' demurrer to plaintiff's complaint, and argument of counsel having been heard and the court having considered the matter.

It is hereby ordered that said demurrer be and the same is hereby sustained; and

It is further ordered that plaintiff have ten days from the date hereof in which to plead further herein.

Dated at Portland, Oregon, this 19 day of October, 1933.

Hall S. Lusk, Judge

[fol. 22] [File endorsement omitted]

IN CIRCUIT COURT OF MULTNOMAH COUNTY

No. 109-931.

HARRY SEMLER, Plaintiff,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS ET AL., Defendants.

OPINION—Filed Oct. 19, 1933

By this suit the plaintiff challenges the constitutionality of Chapter 166 of the Laws of 1933, relating to the practice of dentistry.

The law prior to amendment defined "unprofessional conduct," for engaging in which the penalty is revocation or suspension of the dentist's license, as follows: Employing what are known as "cappers" or "steerers" to obtain business. Obtaining of any fee by fraud or misrepresentation. Wilfully betraying professional secrets. Employing, directly or indirectly, any student or any suspended or unlicensed dentist to perform operations of any kind or to treat lesions of the human teeth or jaws or correct malimposed formations thereof. In making use of any advertising statements of a character tending to deceive or mislead the public. By the 1933 amendment the scope of the previous statutory definition of "unprofessional" conduct is enlarged so as to include therein certain designated types of advertising, namely: Advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign; advertising "containing as a part thereof the representation of a tooth, teeth, bridge work, or any portion of the human head." Employing or making use of advertising solicitors. Employing "free publicity press agents." Ad- [fol. 23] vertising any free dental work or free examination. Advertising to guarantee any dental service. Advertising "to perform any dental operation painlessly."

The plaintiff is a duly licensed and practicing dentist of this State, with offices in the City of Portland. He alleges in his complaint that he has been engaged in the practice of his profession in this state since June 9, 1918; that during that time h*as* has resorted to advertising in most of the ways prohibited by the 1933 act; that he has acquired a degree of skill and ability in the practice of his profession superior to that of the majority of practicing dentists, and by reason of his advertising practices has acquired a very large business with a very large number of patients; that he and his assistants have treated approximately 75000 patients, and now treat 150 patients daily; that he is able to represent truthfully that he possesses superior professional skill and ability and that he will guarantee dental services performed by him, and that all his advertisements have always been truthful and honest; that, if the statute is enforced his business will be destroyed or very materially impaired.

He contends that the legislation deprives him of his property without due process of law and is discriminatory and therefore violates provisions of the constitutions of the United States and of the State of Oregon.

The case is now before the court on demurrer to the complaint.

The plaintiff concedes that the old legislation is unobjectionable from a constitutional standpoint, but asserts that the amended act is arbitrary, and without any reasonable relation to any end within the competency of the state to attain, in that it prohibits advertising harmless in itself and without regard to the truth or falsity of the statements published; that, indeed, the actual legislative purpose was not to protect the public against fraud or imposition or the practices of unskilled or incompetent dentists, but that the real purpose was, by writing into the statute law of the state, the code of ethics of the American Dental Association, to prevent honest advertising, and (to quote from the able brief of plaintiff's counsel) "to remove from the profession any dentist who desires to acquaint the public [fol. 24] with his superior skill or with his willingness to render dental services for less money than another."

In this contention lies the kernel of the controversy. If the legislation is arbitrary, if it cannot be justified as an exercise of the State's power to enact laws in the interest of the public welfare, it is the duty of the court to declare it unconstitutional, because a law not enacted in good faith for the protection of the public good but passed from the sinister motive of annoying or oppressing a particular person or class of persons, is invalid as offending the fundamental principle of the equality of the laws. Yick Wo v. Hopkins, 118 U. S. 356.

On the other hand, it is the position of the defendants that the state has the power, in the exercise of its undoubted right to regulate the practice of a learned profession such as dentistry, to limit the dentist's use of the advertising medium, to the end that the public may be protected from the frauds, artifices and chicane of unscrupulous members of the profession.

The question, then, is whether this statute has been enacted pursuant to the police power of the state. That power has never been better defined than in the classic language of Chief Justice Shaw in the celebrated case of Common-

wealth v. Alger, 7 Cush. (Mass.) 53, when he described it as 'the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with or without penalties, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

In the enactment of such laws, the Legislature is not limited to the prohibition of acts wich are in themselves harmful.

"A calling," said the Supreme Court in Booth v. Illinois, 184 U. S. 425, "may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious."

[fol. 25] That the practice of dentistry is subject to reasonable regulations by the Legislature, none will deny. It is today regarded as one of the learned professions. It is a calling which may be pursued, not as a matter of right, but only as a privilege granted by the state upon proof by the applicant that he is qualified by learning, skill and character to assume the duties and obligations and share in the rewards of that profession. The right of the state to impose such conditions cannot be called in question. Dent v. West Virginia, 129 U. S. 114. In that case the Supreme Court said that "the power of the state to enact such laws, regulating the performance of surgery, as are calculated to protect the people from ignorant pretenders and charlatans, has been established by repeated adjudications, and is now too firmly established to admit of doubt."

The practice of dentistry intimately concerns the public health. The relation between dentist and patient is one of trust and confidence. The patient places himself in the dentist's hands and is bound to rely implicitly on his knowledge, skill and honesty. Any law, therefore, which reasonably tends to protect the patient in that relationship comes properly within the state's police power, because the state has the right and the supreme duty of legislating in the interest of the public health and for the prevention of fraud.

Moreover, it is to be remembered that we are dealing here with a profession, and not a business. True, men make their living by the one as by the other, but the entirely

legitimate methods by which a merchant builds up his business may be objectionable and fruitful of evil if employed by the members of a profession. It is to the interest of the public that the standard of character of those practicing a profession be kept as high as possible. To this end efforts are made by boards charged with the duty of determining the fitness of applicants for admission into the various learned professions to exclude all those who are undesirable from the standopint of character. It would be a legiti- [fol. 26] mate concern of the State to make a profession as unattractive as possible for those who look upon that profession as purely a money-making pursuit, and are little mindful of the important duties, binding in conscience and rarely enforceable by coercive measures, which they assume when they are licensed by the state to practice one of the healing arts.

The legislation now under attack only indirectly regulates the practice of dentistry. Directly, it is a limitation on the means by which the dentists may attract patrons to his office. It is a prohibition on advertising for patients by the dentist proclaiming his superior merits, and in the other ways specified in the statute. It may be that the Legislature enacted into law what was formerly only a code of ethics, but that fact by itself would not make it repugnant to constitutional guarantees, if the code of ethics reasonably tends to promote a legitimate legislative object.

It is my opinion, having in mind the nature of the privilege which the dentist enjoys at the hands of the state, the character of the relationship between dentist and patient and the direct interest of the state in the profession of dentistry and in the standards of honesty and devotion to duty to be observed by its members, that the Legislature, in the exercise of the police power and particularly that phase of it which relates to the public health and the prevention of fraud, has not violated rights guaranteed to the plaintiff by the constitution of this State or the United States in enacting the legislation now challenged.

It may be that plaintiff has never, as he claims, departed from the strict truth in his advertisements. It may be that he is as skillful and competent and careful as he asserts. But, the Legislature is not for that reason limited to the prohibition of only false or misleading advertisements. The additional opportunity which advertising of the allur-

ing and braggadocio type gives to the unscrupulous dentist to beguile gullible people into his office and fleece them, may well have induced the Legislature to believe that the existing legislation was not adequate for the purpose for which it was enacted, and the court cannot say that the Legisla- [fol. 27] ture was without good grounds for that belief. The commercializing and degredation of an honorable profession which may easily result from unrestrained advertising by illegitimate and unconscionable methods which are easily practised but with the utmost difficulty can be proved and prevented, were no doubt considerations which impelled the Legislature to the action which it took. These are evils which are a proper subject of legislative concern, and which the enactment would tend to correct.

The Supreme Court of Washington in the case of Laughney v. Maybury, 145 Wash. 146; 259 Pac. 17; 54 A. L. R. 393, sustained the validity of a similar law with relation to osteopaths. The Colorado court in the case of Chenoweth v. State Board of Medical Examiners, 141 Pac. 132, held unconstitutional a statute which prohibited the publication and circulation by a physician of advertisements relative to any disease of the sexual organs. If some of the principles announced in the opinion in the Chenoweth case are to be followed, then the law here in question must be declared invalid, but the Colorado court took no account of what seem to me to be controlling considerations based on the fact that the law dealt with a learned profession. Moreover, there are, in my opinion, obvious grounds of public policy which justify a law prohibiting the advertising of remedies for sexual diseases, whether by physicians or any one else. I do not deem it necessary to refer to any of the numerous other authorities cited in the exhaustive briefs of counsel. I have read them with care. I think the Washington decision expresses the correct rule of constitutional law to be applied to this case.

The contention that the act is discriminatory because it applies only to dentists, and not to physicians and other professions, cannot be sustained. Neither due process of law nor the equal protection of the laws is denied "when a law is founded on some natural basis of classification and all persons within its scope are treated alike under similar circumstances." McGehee on Due Process of Law, p. 312. As that author says: "When regulations are imposed upon

one trade or business on valid grounds, it is not a subject of complaint that other kinds of business are not subject [fol. 28] to like regulations." Here, the legislature was dealing with the subject of the practice of dentistry. It was not required to enact similar legislation for other professions in order to avoid the charge of discrimination.

It is further urged that some of the provisions of the law are so vague that they are void for indefiniteness and uncertainty; and that the statute is void for want of a proper title. As to the former contention, it is sufficient to say that plaintiff alleges in his complaint that he is doing the very things concerning which he makes the objection of uncertainty. As to the title, the contention is that the word "misconduct" in the title of the 1913 Act (Chapter 353, Laws 1913) and which may be said to be incorporated in the title to the 1933 Act, is not broad enough to cover the acts included in the definition of unprofessional conduct in the 1933 Act, and, therefore, that the title does not conform to Article 4, Section 20 of the State constitution which provides:

"Every act shall embrace but one subject, and matters, properly connected therewith, which subject shall be expressed in the title * * *"

Passing the question as thus presented, it seems to me that inasmuch as the title of the 1933 act contains the words "relating to the practice of dentistry," the contention of the plaintiff in this particular is without merit.

In concluding this brief statement of the reasons which have lead me to hold this act to be a valid exercise of the police power, I refer again to those allegations of the plaintiff's complaint wherein it is stated that he and his assistants are treating 150 persons daily, and that this large volume of business will be destroyed or substantially impaired if the plaintiff is not permitted to advertise in the future as he has in the past. The plaintiff thus admits that he is unable either to secure a large number of patients or to hold them by his skill and ability alone, but that advertising of the kind denounced by the statute as unprofessional conduct is essential to his financial success. The picture thus graphically painted of an honorable profession thoroughly commercialized suggests a situation that impelled the Legislature to the adoption of this act. If so,

[fol. 29] the court cannot say that that body was not justified in the course that it took.

The demurrer to the complaint will, therefore, be sustained.

The plaintiff will have five days in which to file an amended complaint, and the application of the plaintiff heretofore made for leave to amend the complaint by alleging a defect in the title of the Act will be allowed, so that this question can be carried to the Supreme Court, if it is so desired.

Hall S. Lusk, Judge.

[fol. 30] In Supreme Court of Oregon, en banc

Harry Semler, Appellant,

vs.

Oregon State Board of Dental Examiners, L. A. Rosenthal, Leonard R. Andrews, Carey H. Jenkins, Arthur F. Weeks and M. C. Harris, Members of the State Board of Dental Examiners, Respondents

Appeal from Multnomah County.

Honorable Hall S. Lusk, Judge.

Argued and submitted June 6, 1934.

Lawrence T. Harris and Harry N. Kenin (Harris, Smith & Bryson and Herzog & Kenin on brief) for respondents.

S. J. Bischoff and Frank J. Lonergan for appellant.

Belt, J.:

Affirmed.

[File endorsement omitted.]

[fol. 31] Opinion—Filed June 26, 1934

Belt, J.:

Plaintiff, a duly licensed dentist who has practiced his profession in the city of Portland since 1918, seeks to enjoin the threatened action of the State Board of Dental Examiners to revoke or suspend his license for an alleged violation of certain provisions of chapter 166 of the Laws of Oregon for 1933, amending section 68-1013, Oregon Code

1930, relating to the practice of dentistry. The gravamen of plaintiff's complaint is that the following provisions of the act defining unprofessional conduct which constitute ground for revocation or suspension of a license to practice dentistry are unconstitutional and void: "Advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional services; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly; * * *." Other grounds specified in the act for revoking or suspending a license are not challenged by plaintiff. He does not question that part of the act relating to advertising which prohibits, "making use of any advertising statements of a character tending to deceive or mislead the public."

It appears from the complaint that while plaintiff was engaged in the practice of dentistry he (1) employed the services of advertising solicitors; (2) used as advertising mediums large display signs and glaring light signs showing illustrations of a tooth, teeth and bridge work; and (3) advertised in the daily newspapers as follows: (a) That he had acquired superior skill and ability and knowledge in the practice of dentistry and his ability to perform the professional services of dentistry in a superior manner; (b) the prices that he would charge for various services to be rendered; (c) that he makes examinations for prospective patients without making any charge therefor; (d) that he guarantees all dental work performed by him; and (e) that dental operations are performed painlessly.

[fol. 32] Plaintiff alleges in substance that by reason of the methods of advertising above mentioned he has acquired a large and lucrative practice; that he and his employed assistants—who are licensed practitioners and working under his supervision—have treated daily at his offices approximately 150 patients; and that on account of such volume of business he has been enabled to render service to his patients at a much lower price than charged by most practitioners. Plaintiff also alleges that all of his advertisements were made in good faith and honestly express

his "intention of carrying out each and every of the representations contained therein". It is also averred that if the above statutory provisions are enforced the plaintiff will sustain irreparable loss and injury.

Plaintiff alleges as conclusions of law that the above portion of chapter 166, Laws of Oregon for 1933, is unconstitutional and void because it (1) deprives him of property without due process of law; (2) impairs the obligation of contracts; (3) constitutes class legislation; (4) is so indefinite and uncertain as to be incapable of enforcement, and (5) denies to him equal protection of the law.

A general demurrer to the complaint was sustained and, upon refusal of the plaintiff further to plead, the suit was dismissed. The plaintiff appeals.

The history of legislation in the various states regulating the conduct of practitioners in the learned professions—law, medicine, and dentistry—disclose a marked tendency in recent years to enact more stringent regulations, that the standards of these professions be raised and the ignorant, gullible members of the public be protected from quacks and charlatans who spurn the ethics of their profession and thrive by flamboyant methods of advertising and "high powered salesmanship". Six states, viz., California, Illinois, Michigan, South Dakota, Utah, and Wisconsin, have statutes similar to that of this state prohibiting dentists from employing "cappers" or "steerers" to obtain business. Thirty-two states of the union make it unprofessional conduct for a dentist to make any advertising statement of a character to deceive or mislead the public. Arkansas, Delaware, Illinois, Maryland, Minnesota, [fol. 33] New York, Ohio, and Wisconsin, have similar statutes to that of Oregon prohibiting "advertising professional superiority or the performance of professional services in a superior manner". Five states, viz., Delaware, Illinois, Maryland, New York, and Wisconsin, have statutes making it unprofessional conduct for a dentist to advertise prices for professional services. Delaware, Illinois, New York, and Wisconsin have similar statutes regulating the practice of dentistry and providing against "advertising by means of a large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head". Delaware, Illinois, Maryland, and New York prohibit a dentist

from "employing or making use of advertising solicitors or free publicity press agents". Illinois provides against advertising "free dental services or examinations as an inducement to secure dental patronage". There are ten states which prohibit advertising "to perform any dental operation painlessly". We are not unmindful that the statutory enactments of other states governing professional conduct of dentists have no direct bearing upon the legal questions involved herein, but such legislation—which in most instances is an adoption of the rules of ethics of the American Dental Association—is at least illuminating relative to the trend of legislation to protect the public against fraud and deception.

The legislature, in enacting these drastic regulations, was not dealing with a trade or business, but with a profession whose members deal with the public under an intimate and confidential relationship. The patient ordinarily has implicit confidence in his dentist. He knows not the intricacies of the treatment nor the reasonable value thereof. He submits to treatment with an abiding faith that his dentist is efficient and will deal honorably with him. Hence cases involving the regulation of a trade or business—in which every person has a right to engage—have slight analogy to the one under consideration.

The plaintiff has been privileged to practice his profession by virtue of a license granted by the state, and, in order to obtain the same, it was necessary for him to conform to certain rules and regulations enacted for the pro-
[fol. 34] tection of the public. That, after the issuance of the license, the state, in the exercise of its police power, may also prescribe reasonable rules and regulations governing the subsequent conduct of the licensee, naturally follows. It would likewise seem well founded in law that one who aspires to treat human ailments and thereby invite the confidence of the public to an exceptional degree should be compelled to submit to such regulations as will guard the public as far as possible against fraud and deception. In other words, the extent to which the police power may be exercised depends largely upon the manner and degree in which the public welfare is involved. We conclude then that, while the right of the plaintiff to practice his profession is a valuable one and is in the nature of a property right of which he cannot be arbitrarily deprived, it is, nevertheless, a privilege subordinate to the duty of the

state to enact reasonable laws to protect the public health and safety.

Courts, with good reason, have refused to define police power for to do so might thus limit it to the detriment of the public welfare, in the light of changing social and economic conditions. The law should follow closely in the wake of an advancing civilization. Regulation of professional conduct deemed unduly drastic ten years ago might well be considered reasonable under present day conditions. As well said by that eminent jurist, Mr. Justice Field, speaking for the United States Supreme Court, in Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 S. Ct. 231:

"The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud."

In the enactment of the legislation above set forth, providing for the revocation or suspension of a license to practice dentistry, did the legislature go beyond the proper exercise of the police power? Is there any reasonable relation between the questioned prohibitory provisions of chapter 166, Laws 1933, and the object or purpose which the legislature had in mind, viz., the protection of the public against fraud and deception in the practice of dentistry? Certainly the need of such legislation rests primarily upon the judgment of the legislature. It is only when a legislative act clearly appears arbitrary, capricious, and without reasonable relation to the object sought to be attained that [fol. 35] courts will interfere. The presumption is in favor of the validity of the act and that the legislature in enacting the same did so with the view of promoting the public welfare. People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L. R. A. 1915D 538.

Counsel for appellant concede that the state, in the exercise of the police power, has the right to enact legislation to prevent fraud and deception in the practice of dentistry, but assert that these provisions of the act to which attention has been directed do not have such tendency and are an arbitrary interference with his right to practice his profession. It may be that the appellant acted in good faith

and that the representations made in his advertisements express the truth, but such is beside the question. The more pertinent inquiry is: Does the kind of advertising prohibited afford the unscrupulous practitioner a means of perpetrating fraud and deception upon his patients? In itself, there is nothing harmful in merely advertising prices for dental work, or in displaying glaring signs illustrating teeth and bridge work, but who will doubt that practitioners not willing to abide by the ethics of their profession often resort to such advertising methods to lure the credulous and ignorant members if the public to their offices for the purpose of fleecing them. The act does not prohibit all advertising by dentists, but bars only certain specified kinds of advertising as being inimical to the public welfare. The legislature in the passage of the 1933 amendment, which strengthened and amplified prior statutory regulations, relative to the practice of dentistry, undoubtedly was aware of existing conditions and believed the evils resulting from such advertising methods justified further protection to the public. We are unable to say that there was no real or substantial basis for this legislative conclusion. The burden to show to the contrary rests upon the party challenging the validity of the act.

It is well settled that the legislature may enact laws which tend to prevent the perpetration of fraud although the act prohibited is harmless in itself: Kirk v. State, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D 1239. The police power is not limited to the prohibition of acts which are malum in se. If the rule were otherwise, the public could never be ade- [fol. 36] quately protected against the evil effects of that large category of acts which under certain conditions, offer special opportunity to perpetrate fraud and deception. As stated by Freund in his splendid text on Police Power section 272, "The police power undertakes to give an ampler protection, both by adopting precautionary measures and by forbidding certain practices irrespective of an actual intent to defraud."

There is a species of "bait advertising" which, while not fraudulent per se, nevertheless is used by unscrupulous practitioners to lure the unsuspecting public. Such high pressure advertising generally consists of half-truths. Inducing patronage by representations of "painless dentistry," "professional superiority," "free examinations,"

and "guaranteed" dental work is, as a general rule, the practice of the charlatan and the quack to entice the public. Those who have had experience in the extraction and restoration of teeth know full well that "painless" dentistry is a delusion and a snare. Can it reasonably be contended that regulation of such flamboyant and high pressure methods of advertising is beyond the realm of the police power?

In People v. Girard, 145 N. Y. 105, 45 Am. St. Rep. 595, the court sustained the validity of a statute which prohibited the manufacture or keeping for sale any vinegar containing artificial coloring matter even though not harmful to health and the vinegar so colored was equal to the best vinegar of the class which it was colored to represent. The coloring matter, however, was considered as a means of causing a consumer to believe that he was purchasing cider vinegar. Hence, the legislation was deemed a proper exercise of the police power.

The constitutionality of the Bulk Sales Law was involved in Coach v. Gage, 70 Or. 183, 138 P. 847, and the court, in sustaining the act, said:

"Now, the purchase of a stock of goods in bulk is in itself an innocent act; but, for the reason that persons carrying on the business of dealing in merchandise more frequently than otherwise purchase a part of their stock on credit and often from dealers residing at a distance, and because it has become a matter of common knowledge that transfers of stocks of goods in bulk with intent to defraud creditors are a frequent form of swindling, the legislatures [fol. 37] of a majority of the states, in the exercise of their police powers, have enacted laws to safeguard such transfers, * * *"

To the same effect see Lemieux v. Young, 211 U. S. 489, 53 L. Ed. 295, 29 S. Ct. 174.

While courts are not in accord concerning the validity of statutory regulations similar to those under consideration, in our opinion they have been sustained by the weight of authority and the better reasoned cases. Laughney v. Maybury, 145 Wash. 146, 259 P. 17, 54 A. L. R. 393, is in keeping with our views and strongly supports the constitutionality of the act. In that case the validity of a statutory provision (subd. 4 of section 10063 of Remington's Revised Statutes of Washington) was upheld prohibiting oste-

opathic physicians and surgeons from "all advertising of any kind or character other than the carrying of a professional card, window, or street sign." Appellant asserts that this case is not good law and that its effect as an authority has been largely destroyed by the two later cases of State Board v. Macey, 96 Wash. 614, 159 P. 701, and State Board v. Jordan, 92 Wash. 314, 158 P. 982. We cannot agree with this contention. The statute under consideration in the Macey case was entirely different from the one involved in Laughney v. Maybury, supra. The objection to it was based upon its alleged uncertainty and vagueness and no question was raised concerning whether the legislation was a proper exercise of the police power. The same distinction applies to the Jordan case. Neither of these decisions indicates that a law prohibiting or regulating advertising, and not specifically mentioning deceit, misrepresentation or injury to the public welfare, would be unconstitutional.

In State Medical Board v. McCrary, 95 Ark. 511, 131 S. W. 544, Ann. Cas. 1912A 631, the validity of a statute was upheld authorizing the revocation of a license to practice medicine on the ground of "publicly advertising special ability to treat or cure chronic and incurable diseases." Appellant, in quoting the statute, inadvertently uses the word "and" instead of "or" and argues that, since it is fraudulent to advertise ability to cure incurable diseases, this case is not in keeping with Laughney v. Maybury, supra. However, it is observed that the statute also deals with advertising ability to *treat* incurable diseases and this [fol. 38] does not necessarily involve any element of deception.

In the case of Thompson v. Van Lear, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. (N. S.) 588, the court held that an act forbidding physicians and surgeons to solicit patients by paid agents was a valid exercise of the police power. In commenting on this case, it was said in State Medical Board v. McCrary, supra:

"For like reason, a statute forbidding a physician to advertise for patients in newspapers would be upheld; and, by analogy, a statute forbidding them to advertise their ability to treat and cure certain named diseases would be a valid exercise of the police power."

For other cases involving statutes regulating advertisements by those engaged in professional work as in law, medicine, and dentistry, see cases collated in note 54 A. L. R. 400.

Plaintiff relies largely on Chenoweth v. State Board of Medical Examiners, 57 Colo. 74, 141 P. 132, which holds unconstitutional a statute authorizing the revocation of a license on the ground, among others, of "causing the publication or circulation of an advertisement relative to any disease of the sexual organs." This case supports the theory of appellant but its logic does not appeal to us as being sound and we decline to follow it for the reasons stated in Laughney v. Maybury, supra. Furthermore, this opinion by a divided court, has been greatly weakened by the later cases of People v. Painless Parker, Dentist, 85 Colo. 304, 275 P. 928, 930, and Sapero v. State Board of Examiners, 90 Colo. 568, 11 P. (2d) 555. While these two cases involved questions different from that in Chenoweth v. State Board, supra, the following language in the Parker Dentist Case is significant: "There may be expressions in the majority opinion that give color to some things contained in the defendant's briefs here: but that decision—and we are not to be understood as approving of it—is not authority for the defendant's contention here."

Waller v. State (Tex. Civ. App.) 68 S. W. (2d) 601, also supports the contentions of the plaintiff, but no discussion of the same is necessary, as it is merely a repetition of the reasoning in the case of Chenoweth v. State Board, supra.

[fol. 39] After careful consideration of the able briefs submitted, this court is of the opinion that the challenged statutory regulations were enacted by the state in the proper exercise of its police power and, therefore, they do not violate the due process clause of the federal and state constitutions. The statute has for its purpose the elevation of the standards of the dental profession and the prevention of advertising of a character ordinarily used by unscrupulous practitioners to deceive or mislead the public. Let it again be stated that this act does not prohibit all kinds of advertising by dentists. Plaintiff may still practice his profession and engage in certain advertising but it must be done in compliance with the law.

Appellant contends that the act is class legislation and unconstitutional for the reason that it applies only to den-

tists. It is his theory that the act is directed against advertising and that, since advertising has the same effect regardless of the professions resorting to it, it is discriminatory to limit the same to dentists. The same contention was made in Laughney v. Maybury, supra, and decided adversely to appellant therein. It is not believed that the act is unconstitutional because the legislature did not cover the whole field of possible abuses. As stated in State v. Broden, 181 Minn. 341, 232 N. W. 517:

"In laws of this sort all evils cannot be reached at once nor every desirable object gained in one legislative session."

The same principle was thus enunciated in New York ex rel. Bryant v. Zimmerman, 278, U. S. 63, 73 L. Ed. 184, 49 S. Ct. Rep. 61, quoting from Patsone v. Pennsylvania, 232 U. S. 138, 58 L. Ed. 539, 34 S. Ct. Rep. 281:

"It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named."

In Miller v. Wilson, 236 U. S. 373, 59 L. Ed. 628, 35 S. Ct. Rep. 342, a statute fixing hours of labor for women was attacked because of certain exceptions made therein. The court said:

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach."

[fol. 40] We think the state has the power of dealing with each profession as a class unto itself and in so doing does not violate the equal protection clause of the constitution. Class legislation is not involved since the act affects all dentists alike. Plaintiff is in no position to say that he has been unduly discriminated against because the legislature did not also enact similar legislation regulating the conduct of members of other professions. The professions of law, medicine, and dentistry are separate and distinct. Each has different requirements for admission and we

think there may well be a reasonable basis for classification concerning regulation of conduct sebsequent to admission.

We see no merit in the contention of appellant that the title to the act is not broad and comprehensive enough to cover the subject matter of the act and therefore contravenes Art. IV, §20, of the Constitution of Oregon. The title of chapter 166, Laws of Oregon for 1933, reads thus:

"To amend section 68-1004, and section 68-1013, Oregon Code 1930, relating to the practice of dentistry, and to repeal section 68-1014, Oregon Code 1930."

In Oregon Growers' Co-Operative Association v. Lentz, 107 Or. 561, 212, P. 811, it is said:

"In amending a statute it is only necessary that the title to the amendatory act should refer to a particular section of an official compilation of laws: State v. Phenline, 16 Or. 107 (17 Pac. 572). And the amendment will not be objectionable to Section 20, Article IV of the Constitution, unless the provisions of the amendment are such as could not have been included in the original act: Ex parte Howe, 26 Or. 181 (37 Pac. 536).".

Section 68-1013, Oregon Code 1930, was enacted by chapter 353, Laws of Oregon for 1913, and is entitled an act:

"To amend Sections 4777, 4779, 4780 and 4783 of Lord's Oregon Laws and to regulate the use of diplomas and certificates of dentists, and to provide punishment for the violation thereof, and to provide for the revocation and suspension of licenses for the misconduct of the holders thereof, and to provide for the issuing of licenses."

Appellant argues that the word "misconduct" in the act of 1913 includes only those acts of the practitioner which are inherently wrongful or fraudulent and is not sufficiently broad and comprehensive enough to include acts of unprofessional conduct not inherently wrong as defined in the 1933 amendment. We can not agree with this contention. In our opinion the subject matter of the amendatory act in question is germane to the title of the 1913 amendment providing for the revocation of licenses to practice den- [fol. 41] tistry. The word "misconduct" includes unprofessional acts even though not inherently wrongful.

It is urged that the statute is void for uncertainty and vagueness. The very object and purpose of the 1933 amendment was to make the regulations concerning advertising by dentists definite and certain. That plaintiff fully understands the various provisions of the act is demonstrated by the specific allegations of his complaint, showing a violation thereof. See cases in note 54 A. L. R. 404, wherein similar statutes have been held not void as being too vague and uncertain to be enforced.

The decree of the lower court is affirmed. Defendants are entitled to costs and disbursements.

ROSSMAN, J., not sitting.

[fol. 42] IN SUPREME COURT OF OREGON

[Title omitted]

STATEMENT REGARDING FILING AND DECISION ON PETITION FOR REHEARING

And thereafter on the 14th day of August, 1934, a Petition for Rehearing was filed in this court in this cause on behalf of Appellant. Said Petition for Rehearing was denied in an oral order by the Court on September 11, 1934.

[fol. 43] IN SUPREME COURT OF OREGON

En Banc

HARRY SEMLER, Appellant,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, CAREY H. JENKINS, ARTHUR F. WEEKS AND M. C. HARRIS, Members of the State Board of Dental Examiners, Respondents.

Appeal from Multnomah County.

JUDGMENT—June 26, 1934

This cause on June 6, 1934, having been duly tried, argued and submitted upon and concerning all questions arising

upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs, finds there is not error as alleged.

It is therefore considered, ordered and decreed that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed, and adopted as the decree of this court in this cause.

[fol. 44] The appellant having given an undertaking on appeal with Dr. M. M. Solko as his surety, conditioned that appellant will pay all damages, costs and disbursements awarded against him on appeal; it is therefore ordered and decreed that respondents recover of and from appellant and his said surety their costs and disbursements in this court taxed at $246.00.

It is further ordered that this cause be remanded to the court below from which the appeal was taken, with directions to enter a decree in accordance herewith.

[fol. 45] [File endorsement omitted.]

[Title omitted.]

IN SUPREME COURT OF OREGON

PETITION FOR APPEAL—Filed October 18, 1934

To the Honorable John L. Rand, Chief Justice of the Supreme Court of the State of Oregon:

Comes now your petitioner, Harry Semler, appellant herein, by his attorneys, and respectfully shows:

That on the 19th day of October, 1933, an order in the above entitled cause was entered by the Honorable Hall S. Lusk, Judge of the Circuit Court of the State of Oregon for Multnomah County sustaining the above-named respondents' demurrer to your petitioner's complaint; that appeal from said order was duly taken according to law to the Supreme Court of the State of Oregon; that on the 26th day of June, 1934, a final judgment herein was entered in this court against appellant and thereafter and within time allowed by law appellant duly filed a petition for rehearing, which petition was considered by this court and on the 11th day of September, 1934 was denied, and thereupon said final judgment was re-affirmed.

That the controversy herein involved a statute of the State of Oregon, namely, Section 68-1013 Oregon Code of Laws, 1930, as amended by Act of the Oregon Legislature on March 1, 1933, said amendment being Section 2 of Chapter 166, Laws of Oregon, 1933, the Validity of a portion of which statute was drawn in question by appellant on the [fol. 46] ground that it is repugnant to the Constitution of the United States.

That there is error in the final judgment and the record of proceedings in this cause in the said Supreme Court of the State of Oregon which more fully appears from appellant's assignments of error filed herewith whereby appellant, your petitioner herein, is aggrieved.

Wherefore, petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of Oregon against petitioner to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of the State of Oregon may be examined and reversed, and further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Oregon, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner further prays that the appeal herein may be a supersedeas; that the court by appropriate order may fix the security required with respect to accumulated costs in the lower court and in this court, together with any costs which may be entered in the Supreme Court of the United States against petitioner.

Harry Semler, Petitioner, Senn & Recken and James Arthur Powers, Attorneys for Petitioner.

[fols. 47 & 48] *Duly sworn to by Harry Semler. Jurat omitted in printing.*

[fol. 49] [File endorsement omitted]

[Title omitted]

IN SUPREME COURT OF OREGON

ORDER ALLOWING APPEAL—Filed Oct. 18, 1934

On this 18th day of October, 1934, on reading the petition of Harry Semler, the appellant herein, praying for the issuance of an order herein allowing his appeal to the Supreme Court of the United States from the Supreme

Court of the State of Oregon, and it appearing from said petition and record of the above-entitled cause that there was drawn in question the validity of a statute of the State of Oregon, namely, Section 68-1013 Oregon Code of Laws, 1930, as amended by Act of Oregon Legislature on March 1, 1933, said amendment being Section 2 of Chapter 166, Laws of Oregon, 1933, on the ground that said statute deprives the appellant of his property without due process of law and is repugnant to the constitution of the United States, and that said statute is not a proper exercise of police powers in that said statute further contravenes the provisions of the United States Constitution by an unlawful attempt to deprive and interfere with the petitioner's rights, privileges and immunities guaranteed to him under the Constitution of the United States, and that such petition is a proper petition for the issuance of this order.

[fols. 50 & 51] Now therefore, it is ordered by the undersigned, the Chief Justice of the Supreme Court of the State of Oregon, that said appeal be and the same is hereby allowed, and it is further ordered that the appellant, Harry Semler, execute to the respondents his bond, with surety to be approved by the undersigned, in the sum of Fifteen Hundred $1500.00 Dollars, conditioned according to law, and that when said bond has been approved and filed, the same shall act as a supersedeas and stay the execution on the judgment for costs heretofore recovered by the respondents, including the costs both in the lower court and on appeal to this court.

It is further ordered that the Clerk of this Court, within sixty days from this date, make and transmit to the Clerk of the United States Supreme Court, under his hand and seal of this court, a transcript of the record herein, containing a true copy of all material parts of the record herein which shall be designated by præcipe filed with him by either parties hereto.

Done this 18th day of October, 1934.

John L. Rand, Chief Justice of the Supreme Court of the State of Oregon.

Arthur S. Benson, Clerk of the Supreme Court of the State of Oregon, acknowledges receipt of the foregoing order allowing appeal this 18th day of October, 1934.

Arthur S. Benson, Clerk Supreme Court, State of Oregon.

[fol. 52] [File endorsement omitted]

[Title omitted]

IN SUPREME COURT OF OREGON

ASSIGNMENT OF ERRORS—Filed Oct. 18, 1934

Now comes appellant above named, and in connection with his petition for an appeal to the United States Supreme Court, says that errors have been committed in the above entitled case, and sets forth the following assignment of errors for the purpose of having the same reviewed in the United States Supreme Court:

1. The Supreme Court of the State of Oregon erred in failing to declare invalid and unconstitutional a statute of the State of Oregon, namely, Section 2 of statute 68-1013 Oregon Code Laws 1930 as amended by Chapter 166, page 208, Oregon Session Laws, 1933, in so far as said act prohibits advertising by a dentist, even though such advertising is made truthfully. The act unlawfully discriminates against appellant, denies to him the equal protection of the laws and deprives him of his property without due process of law, in violation of Section 1 of XIV Amendment of the Constitution of the United States.

2. The Supreme Court of the State of Oregon erred in failing to render judgment in favor of appellant on the ground that aforesaid state statute is unconstitutional and void, for the reason that it is an unlawful and unreasonable interference with the conduct of a lawful business, viz., the practice of the dental profession, and is an unlawful at-[fols. 53-63] tempt by the legislative branch of the government to delegate to a Board of Dental Examiners power and duties of the courts, and constitutes an unlawful invasion by the legislative branch of the government into the powers and duties which, under our system of government, belong solely to the courts and judicial branch of the government.

3. The Supreme Court of the State of Oregon erred in holding the amended portion of the aforesaid state statute, which has for its purpose the regulation of the ethics of the Dental profession, to be a proper exercise of police power, and not in violation of Section 1 of XIV Amendment of the Constitution of the United States.

4. The Supreme Court of the State of Oregon erred in failing to hold that aforesaid state statute, in so far as it prohibits advertising only by a dentist and does not prohibit advertising by other professional men similarly situated, unlawfully discriminates against appellant and denies appellant the equal protection of the laws, in violation of Section 1 of XIV. Amendment of the Constitution of the United States.

For which errors the appellant prays that said judgment of the Supreme Court of the State of Oregon, dated June 2, 1934, in the above-entitled cause, be reviewed by the Supreme Court of the United States and reversed, and judgment rendered in favor of appellant, and for costs.

Senn & Recken and James Arthur Powers, Attorneys for Appellant.

[fols. 64-67] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Nov. 30, 1934

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

H. R. Colwell, James Arthur Powers, F. S. Senn, Attorneys for Appellant.

[fol. 69] STATE OF OREGON,
County of Multnomah, ss:

Due, timely and legal service by copy admitted at Portland, Oregon, this 27th day of October, 1934.

Ralph V. Herzog & Lawrence F. Harry, of Attorneys for Appellees. James Arthur Powers, H. R. Colwell, Attorneys for Appellant.

[fol. 70] [File endorsement omitted]

Endorsed on cover: File No. 39,166. Oregon, Supreme Court. Term No. 538. Harry Semler, Appellant, vs. Oregon State Board of Dental Examiners, L. A. Rosenthal, Leonard R. Andrews et al., etc. Filed November 23, 1934. File No. 538 O. T. 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 538

HARRY SEMLER,

Appellant,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, CARRIE H. JENKINS, ARTHUR F. WEEKS AND M. C. HARRIS, MEMBERS OF THE STATE BOARD OF DENTAL EXAMINERS.

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully shows that:

First.

The Supreme Court of the United States has jurisdiction in the appeal of this cause by virtue of a statute of the United States, namely, Section 237 of the Judicial Code, as amended and now published in U. S. Code, Title 28, Section 344.

Second.

This is an appeal from a final judgment of the Supreme Court of the State of Oregon, the highest court of the State of Oregon, and which judgment became final on the 11th

day of September, 1934, on which date said court denied appellant's petition for rehearing.

Third.

The judgment appealed from upholds the constitutionality of a statute of the State of Oregon, the validity of which was drawn in question and challenged on the ground that it violates Section 1 of the XIVth Amendment of the Constitution of the United States. The cause originated on plaintiff-appellant's complaint, by which complaint appellant, a licensed, practicing dentist of Portland, Oregon, sought to enjoin a threatened enforcement of said statute, namely, Section 68-1013, Oregon Code Laws, 1930, as amended by act of Oregon Legislature on March 1, 1933, said amendment being Section 2 of Chapter 166, Oregon Session Laws, 1933, page 208, which statute provides in part that any dentist may have his license revoked or suspended by the Board of Dental Examiners for unprofessional conduct, and states that unprofessional conduct shall mean, among other things, the following:

> "advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

Said statute further provides that "The proceedings under this section may be taken by the board from the matters within its own knowledge * * *." The statute in effect makes the Board of Dental Examiners the accuser,

judge and jury. The statute does provide for an appeal to the State courts from a decision of the Board of Dental Examiners, but as a condition to the right to appeal, it requires the accused first to furnish security for costs.

Fourth.

The appellant here, plaintiff below, filed his complaint, a suit in equity, in the Circuit Court of the State of Oregon for Multnomah County, and therein alleged in substance that he has been a duly licensed dentist of the State of Oregon continually since the year 1918, and as such, since that time, has been engaged in practicing dentistry in the City of Portland, Oregon; that from the beginning of his practice he has used advertising methods now forbidden by the above quoted portion of said statute; that his advertising has always been made truthfully and honestly; that he has contracted in advance for such advertising with several firms and newspapers, which contracts have a long period of time to run, and that he has obligated himself on other contracts with dental assistants and large office space; that a threatened enforcement of said statute would deprive him of his property without due process of law, in violation of Section 1 of Amendment XIV of the Constitution of the United States, together with allegations that said statute violates the organic State law of Oregon. The defendants below, respondents herein, filed a demurrer to said complaint, which demurrer was sustained by said lower court on the 19th day of October, 1933, on the express ground, among others, that said statute does not violate the Constitution of the United States. Whereupon appellant perfected an appeal from said lower court's ruling to the Supreme Court of the State of Oregon, which court on appeal also held said statute to be valid and not in violation of the United States Constitution. Accordingly the Supreme Court of the State of

Oregon entered its judgment upholding said statute on June 26, 1934, whereupon appellant thereafter, and within time allowed by law and by the rules of the Supreme Court of the State of Oregon, duly filed in said Supreme Court his petition for rehearing, and said petition for rehearing was considered by the said Supreme Court of the State of Oregon and was by said court denied on the 11th day of September, 1934, and its said judgment is final.

Fifth.

The question as to the validity of the statute under consideration is of public importance. During the past two years several States have enacted similar statutes in an unique attempt to try to enact into statutory law the ethics of the American Dental Association, under the guise of police powers, and thereunder to empower a small group of politically appointed men on a dental board, on their own initiative, to revoke a fellow dentist's license for advertising his work or prices, even though he advertises them honestly. Such a statute attempts to do indirectly what could not be done directly. Quite obviously such a law is not for the benefit or welfare of the general public but is designed for the financial benefit of a portion of the dental profession and at the expense of the public. This is shown by the fact that there have been statutes in the past, and there are now statutes in a good many States making it unlawful for a dentist to use deceptive or fraudulent advertising. Oregon has had such a law since 1913 and appellant is heartily in accord, but it has only been in the immediate past that the State of Oregon, along with a few other States, has enacted a law making it unlawful for a dentist to advertise, even though the advertising is truthful and not fraudulent or deceptive.

There is a conflict in the decisions of the State courts as to the constitutionality of such a statute. The State

courts of Ohio, Texas, Colorado and Illinois have declared statutes of like import to be unconstitutional:

Ohio: *Ex parte Craycroft*, 24 Ohio N. P. (N. S.) 513.
Texas: *Walker* v. *State*, 68 S. W. (2d) 601.
Colorado: *Chenoweth* v. *State Board of Medical Examiners*, 141 Pac. 132.
Illinois: *Kalman* v. *Walsh*, 189 N. E. 315 (decided Feb. 23, 1934).
Schierson v. *Walsh*, 187 N. E. 921.

whereas it has been held by the State of Washington that a statute of similar import is constitutional:

Laughney v. *Maybury*, 145 Wash. 146.
State Board of Medical Examiners, 159 Pac. 801.

The question involved has not been considered or passed upon by the Supreme Court of the United States, and, in view of the conflict of State decisions, final ruling by this Court is highly desirable. The validity or invalidity of the statute in question is one of concern not only in the State of Oregon but in sister States where legislation of a like nature has of late been and is now being enacted.

In addition to the above, we believe the following cases support and sustain the jurisdiction of the United States Supreme Court in this case.

Bryant v. *Zimmerman*, 278 U. S. 63.
Blodgett v. *Silberman*, 277 U. S. 72.
Miller v. *Schoene*, 276 U. S. 272.
John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100.
Bandini Petroleum Co. v. *Superior Court of Cal.*, 284 U. S. 8.

This application for appeal to the United States Supreme Court is made to Chief Justice John L. Rand of the

Supreme Court of the State of Oregon, and the necessary papers filed therewith and in support thereof on the 18th day of October, 1934.

Respectfully submitted,

H. R. Colwell,
F. S. Senn,
L. A. Recken,
James Arthur Powers,
Attorneys for Appellant.

(5676-C)

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 538

HARRY SEMLER,

Appellant,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, CARRIE H. JENKINS, ARTHUR F. WEEKS and M. C. HARRIS, MEMBERS OF THE STATE BOARD OF DENTAL EXAMINERS.

Appellees.

OPINION BELOW.

The opinion of the Supreme Court of the State of Oregon is found in case 2541, Oregon Advance Sheets, Volume 18, page 1223, decided June 26, 1934, and reported in 34 Pac. (2d) 311.

JURISDICTION.

In compliance with rule 12, appellant submitted his statement showing the basis of this court's jurisdiction in this cause. On December 10th, 1934, this court entered an order providing that further consideration of the question of jurisdiction be postponed to a hearing on the merits. Argument upon this question is submitted herein, pages 38 to 45, inclusive.

QUESTIONS PRESENTED

The question presented is whether or not the legislative enactment of the State of Oregon prohibiting a dentist from advertising regarding professional superiority or professional service in a superior way, advertising prices for professional services, advertising by means of large display and employing solicitors and publicity agents, guaranteeing dental work or guaranteeing dental operations painlessly, and permitting the dental board to bring the charges and hear them, contravenes the Constitution of the United States, and whether the enactment is in contravention of the due process of law provision, whether it impairs the obligations of contracts and whether it unreasonably abridges the privileges and immunities of citizens of the United States, and whether the law attempts to impose unreasonable and unlawful restrictions upon the exercise of the plaintiff's profession of dentistry, and whether it is a proper exercise of police powers of the state.

STATUTES INVOLVED.

Oregon Laws, Special and Regular Session, 1933, Chapter 166, page 208.

STATEMENT OF FACTS

Harry Semler, the plaintiff-appellant, is a practicing dentist in the City of Portland, Oregon, and duly licensed under the laws of the State of Oregon.

In 1913 the Legislature of the State of Oregon passed the dentist qualification law, which act is found in Sections 68-1001 to 68-1009 inclusive, Oregon Code Annotated, 1930 Edition. Section 68-1013 provided that the license of a practicing dentist might be revoked upon the following ground:

First, conviction of a felony or misdemeanor involving moral turpitude.

Second, for renting or loaning to any person his or her license or diploma to be used as a license or diploma by such person.

Third, "For unprofessional conduct, or for gross ignorance or inefficiency in his profession. Unprofessional conduct shall mean employing what are known as 'cappers' or 'steerers' to obtain business; the obtaining of any fee by fraud or misrepresentation; wilfully betraying professional secrets; employing directly or indirectly any student or any suspended or unlicensed dentist to perform operations of any kind, or to treat lesions of the human teeth or jaws, or correct malimposed formations thereof; the advertisement of dental business or treatment or devices in which untruthful or misleading, improbable or impossible statements are made; or habitual intemperance or gross immorality."

In 1933 the Legislature of the State of Oregon amended this act. The amendment is found in Oregon Laws, Special and Regular Session, 1933, Chapter 166, page 208, in which amendment the causes for revoking a dentist's license are greatly enlarged, and a number of causes are enumerated as sufficient for revoking one's license not provided for in the original act. Additional causes for revoking the license are as follows:

"advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

The amendment of 1933 added the following definitions of unprofessional conduct:

1. Advertising professional superiority or the performance of professional services in a superior manner.
2. Advertising prices for professional services.
3. Advertising by means of large display, glaring light signs or containing as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head.
4. Employing or making use of advertising solicitors or free publicity agents.
5. Advertising to guarantee any dental work.
6. Advertising to guarantee any dental operation painlessly.

It will be noticed that these new prohibitions merely condemn the *advertising* of certain acts. For instance, the act does not condemn a dentist guaranteeing that he will make his work good if it should result disastrously, nor does it deny the dentist a right to make free examinations or bestow free dental work upon people who are not able to pay, but it does deny him the right to advertise such facts. The wrongdoing on the part of the dentist consists

in his advertising and not in performing the acts themselves.

The plaintiff-appellant filed a complaint in the Circuit Court of the State of Oregon for the County of Multnomah in which complaint he set up and alleged that on the 6th day of June, 1918, he was duly admitted to practice dentistry in the State of Oregon and that a license was granted to him and that the license was in full force and effect at the time the act in question was passed. He further alleges that ever since said time he has been practicing his profession in Portland, Oregon. He alleges that prior to the act in question passed by the Legislature in 1933 there was in existence the former act passed by the Legislature in 1913, which provided for revocation of license under certain conditions and circumstances. He alleges that he has always advertised his occupation in the daily newspapers and periodicals and by means of signs in and about the building which he occupies. He alleges that he advertised his professional and occupational skill truthfully and honestly. He alleges that he has during his practice acquired skill and ability to perform his work and that because of his experience and large number of clients he has acquired superior skill or ability in dental work. He further alleges that because of his low prices he is able to render dental services even to the poorest pople and that because of this fact he is rendering a beneficial public service in view of the fact that many people are not able to pay the ordinary dental prices, and because of this fact the plaintiff reaches a class of people who otherwise would be

unable to secure dental services at all. He also alleges that he has contracts with the Oregon Neon Sign Company for an advertising sign in front of the offices he occupies, and that said contract runs for a period of forty-four months from October 1, 1932, at a rental of $50.00 per month, and that the law in question would render said contract of no value to him. He also alleges that he has enforceable contracts with the newspapers in the City of Portland, namely, the Oregonian, Daily Journal and News Telegram, for a definite amount of space for advertising purposes, and that it would become impossible for him to utilize such space if said law was enforced, and that said law impairs the obligation of such contracts. Furthermore he alleges he leased office space in the Alisky Building in Portland, Oregon, under a written lease which still has forty-four months to run, that said space is highly desirable, and includes large quarters, and that said lease would become a detriment and loss to him in case said law was enforced and would impair said lease, in view of the fact that it would deprive plaintiff of much of his business and render said space unnecessary. The plaintiff alleges that the specific portion of said act which plaintiff claims to be unconstitutional and void is the portion reading as follows, to-wit:

> "advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or

free publicity press agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

Plaintiff alleges in his complaint that said act is unconstitutional for the following reasons, to-wit:

(a) The said pretended law attempts to deprive plaintiff of his property "without due process of law and in violation of Section 1, Article 14 of the Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

(b) The said pretended law attempts to impair the obligations of plaintiff's contracts in violation of Section 10, Article 1 of the Constitution of the United States and of Section 21, Article 1, of the Constitution of the State of Oregon.

(c) The said pretended law attempts to deny to plaintiff the equal protection of the laws in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States, and Section 20, Article 1, of the Constitution of the State of Oregon.

(d). That said pretended law violates the provisions of Section 1, Article 14 of the Amendments of the Constitution of the United States which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and Section 20, Article 1 of the Constitution of the State of Oregon.

(e) That the said pretended law attempts to impose unreasonable and unlawful restrictions upon the exercise of the plaintiff's profession of dentistry and thereby affect his property right therein.

The prayer of said complaint seeks to have declared unconstitutional and void the following portion of said act:

> "advertising professional superiority or the performance of professional service in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign, or containing as a part thereof the representation of a tooth, teeth, bridge work, or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work for free examination; or advertising to guarantee any dental service; or to perform any dental operation painlessly."

A general demurrer was filed to said complaint upon the ground that said complaint does not state a cause of suit against the defendants or against any of them; whereupon the trial judge of the Circuit Court for the County of Multnomah, State of Oregon, sustained said demurrer and the plaintiff not pleading further a decree was entered by the trial judge of the Circuit Court of Multnomah County, Oregon, dismissing said complaint without prejudice to plaintiff's rights to appeal from said decree. Thereupon an appeal was had to the Supreme Court of the State of Oregon. After due deliberation the Supreme Court of the State of Oregon affirmed the decree of the Circuit Court in an opinion found in case No. 2541 Oregon Advance Sheets, Volume 18, page 1223, decided June 26, 1934, and reported in 34 Pac. (2d) 311. Thereafter petition for rehearing was filed and after due consideration of said petition it was overruled by the Supreme Court, on the 11th day of September, 1934, and its said judgment became final on said date.

POINTS AND AUTHORITIES.

Said legislative act is unconstitutional and void for the following reasons, to-wit:

(a) The said pretended law attempts to deprive plaintiff of his property without due process of law and in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

(b) The said pretended law impairs the obligations of plaintiff's contracts in violation of Section 10, Article 1 of the Constitution of the United States.

(c) That said pretended law violates the provisions of Section 1, Article 14 of the Amendments of the Constitution of the United States which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(d) That the said pretended law atempts to impose unreasonable and unlawful restrictions upon the exercise of the plaintiff's profession of dentistry and thereby affect his property right therein.

Lochner v. *New York*, 198 U. S. 45-53.

Hawker v. *New York*, 170 U. S. 189-194.

Adams v. *Tanner*, 244 U. S. 590-594.

Kalman v. *Walsh*, 355 Ill. 341-347.

State v. *Redmon*, 134 Wis. 89-107.

Laughney v. *Mayberry*, 145 Wash. 146.

Ex Parte Craycroft, 24 Ohio N. P. (N. S.) 513.

Waller v. *State*, 68 S. W. (2d) 601 (Tex), Decided Jan. 29, 1934.

Chenoweth v. *State Board of Medical Examiners*, 57 Colo. 74.

Schireson v. *Walsh*, 354 Ill. 40.

Brown v. *University of the State of New York*, 273 N. Y. S. 809.

Harris v. *State Board of Optometrical Examiners*, 287 Pa. 531, 535.

Sapero v. *State Board of Medical Examiners*, 90 Colo. 568-580.

Berry v. *State*, 135 S. W. 631 (Tex.).

Hewitt v. *State Board of Medical Examiners*, 148 Cal. 590-593.

State Board of Medical Examiners v. *Macy*, 92 Wash. 614-617.

Glass v. *State Board of Medical Examiners*, 50 Cal. App. 389-392.

Aiton v. *Board of Medical Examiners*, 13 Ariz. 354-360.

Ex Parte McNulty, 77 Cal. 164-168, 19 Pac. 237.

State Board of Medical Examiners v. *Jordan*, 92 Wash. 234-239.

Yoshizawa v. *Hewitt*, 52 Fed. (2d) 411.

To allow the dental board to bring charges for matters within its own knowledge and hear them is not due process of law, even though the member of the board who brings the charges is not allowed to hear them.

Abrams v. *Jones*, 35 Idaho 532.

ARGUMENT

The legislative enactment deprived the plaintiff of his property without due process of law.

The Supreme Court of Illinois, in the case of Kalman v. Walsh, 355 Ill. 341-347, used the following language:

> "The right to practice dentistry is a valuable right. It is a property right within the due process of law clause of the Constitution. Revocation of the license of a professional man to practice his chosen profession carries with it not only disgrace and humiliation, but deprives him of his means of earning his livelihood. It is the death of his professional life and there is usually no resurrection after death."

To the same effect see Waller v. State, 68 S. W. (Tex.) 601-605, a decision by the Court of Civil Appeals of Texas, rendered January 29, 1934.

The complaint, which for the purpose of this demurrer must be considered as true, alleges that the plaintiff has been practicing dentistry since the 6th of June, 1918, and as a result of truthful and honest advertising and high-class workmanship he was possessed of a lucrative dental practice; that the number of his patients aggregated approximately one hundred and fifty per day; and that because of said large practice, it had become possible for him to standardize his office management and operations, to purchase supplies and materials in large quantities, and at prices a great deal lower than dentists who are obliged to buy in small quantities; that by reason thereof plaintiff has been able to establish a uniform schedule of prices; that because of his advertising, patients have become acquainted with the fact that plaintiff could perform dental services in accordance with his advertisements; that his

practice, because of its size, had become lucrative, and that because of this act, which forbids advertising, said property rights accumulated through years of industry and effort will be swept away. In addition to the above, it appears from the complaint that the plaintiff has entered into advertising contracts with the daily newspapers of Portland, Oregon, namely, the Oregonian, Oregon Journal and News Telegram, and has also made advertising contracts with other parties, a number of which have considerable time to run, and that this enactment will render said contracts of no value to him.

We are not unmindful of many decisions of this court to the effect that property rights and contractural rights must yield to the police powers of the state and nation, but in order for the enactment to have a basis under the police powers of the state, the regulation must be reasonable and have a tendency to promote the public health and public welfare.

In the case of Lochner v. New York, 198 U. S. 45, this court said, page 53:

> "The statute necessarily interferes with the right of contract between the employer and employes, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this

amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623; In re Kemmler, 136 U. S. 436; Crowley v. Christensen, 137 U. S. 86; in re Converse, 137 U. S. 624."

In the instant case the plaintiff sells his services to the public, as does each professional man.

The statute does not render the doing of the acts wrongful, but merely prohibits the plaintiff from advising the public through the usual channels of his ability and his capacity to perform such acts. The acts in themselves are not condemned as wrongful. This enactment not only in effect prohibits the plaintiff from entering into contracts, but in effect it also prohibits the advertising mediums of our country from entering into contracts with dentists. It in effect places its inhibition upon both parties to the contract. As this court stated in the last cited case, liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

The primary purpose of legislation of this nature is to qualify the dentist both in character and in learning to perform his duties toward the public, but when the legislation has made his qualifications as to learning and character reasonably certain, there is no more for the police power to effectuate. The enactment in question has no relation to the knowledge or the character of the plaintiff.

In the case of Hawker v. New York, 170 U. S. 189, 194, this court, in speaking of the qualification of a physician, used the following language:

> "It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In Dent v. West Virginia, 129 U. S. 114, 122, it was said in respect to the qualifications of a physician: 'The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud'."

The legislative enactment of 1913 heretofore referred to amply secures to the public certainty as to the character and general demeanor of the dentist. It provides for revocation of his license for any act which in itself involves moral turpitude or wrongdoing. It provides that

the advertisement of dental business or treatment or devices in which untruthful, misleading, improbable or impossible statements are made, shall be ground for revocation of the license of a dentist. Practically all of the states of the Union have been operating under provisions of a like nature for years. It is only the last few years that enactments similar to the one now in question have found their way into our statute books. What was the purpose, then, of the additional legislation? Was it enacted primarily for the benefit and welfare of the public, or was its purpose rather to create within the profession itself rules and regulations in the interest of certain members of the profession? We take it that this legislation must be considered in the light of the legislation already in existence.

As was said by this court in the case of Adams v. Tanner, 244 U. S. 590-594:

> "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.
>
> The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

In Allgeyer v. Louisiana, 165 U. S. 578, 589, we held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the State for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.'

'If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.' Booth v. Illinois, 184 U. S. 425, 429.

'It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself. The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may

differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail'." McLean v. Arkansas, 211 U. S. 539, 547, 548."

The Supreme Court of Wisconsin, in the case of State v. Redmon, 134 Wis. 89-107, used the following language:

"The ostensible purpose of the law, as indicated by its title is to promote the 'health and comfort of occupants of sleeping car berths.' Words were used in such title ex industria, seemingly, to give to the enactment, unmistakably, the character of a police regulation, but a law is not necessarily one to promote the public health and comfort of people generally, or of a legitimate class thereof, merely because such is its declared purpose.

As it is a judicial function to define the proper subjects for the exercise of police power (Town of Lake View v. Rose Hill Cemetery Company, 70 Ill. 191, 22 Am. Rep. 71), it must be to decide, as to any enactment, whether it really relates to a legitimate subject or under the guise of doing so violates rights of persons or property. The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the Legislature so determines is, as we have seen, a heresy, and one which was

repudiated sufficient for all time by the early decision, heretofore referred to, in Marbury v. Madison, supra, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the Legislature and the judiciary thereto and to each other. The doctrine there laid down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidentally, inconsiderately or ignorantly.

These words of the Supreme Court of the United States, speaking by Mr. Justice Harlan, in Mugler v. Kansas, 123 U. S. 623-661, 8 Sup. Ct. 273, 297, 31 L. Ed. 205, expresses in a different form the spirit of the opinion in Marbury v. Madison, supra: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In the words of Blackstone, the great commentator, in considering this legislation we have the old law and the mischief, if any, and the remedy. The former legislation we submit was ample to protect the public. It specifically provides for the revocation of licenses in case of moral or professional delinquency. It specifically provides for revocation of licenses in case of misleading or fraudulent advertising. It even goes so far as to permit

revocation in case of improbable or impossible statements in advertisements. A reading of this act we believe will convince one that the old law was amply sufficient to cope with all existing delinquencies on the part of the dental profession. And what is the danger to which this legislation directs attention? It is not because of any lack of knowledge or character on the part of the dentist for the legislation in question does not in any respect tend to elevate or increase the qualifications of the dentist. It adds nothing to the sum total of his knowledge or to his qualifications in regard to character and fair dealing, but it is contended that to allow a dentist to advertise his qualifications or the price which he may charge, or the fact that he will give free examinations or free dental service has a tendency to injure the public welfare and all this in an age when education is almost universal and the further fact that dental services are today the rule and not the exception. The care of teeth is taught in our public schools. The subject of hygiene is now almost as common in our educational system as mathematics. While it is true that the dental profession is one of the learned professions in conjunction with the law or medicine, it is also true that much of the work of a dentist is of a mechanical nature. The extraction of a tooth, the filling of a cavity, the placing of a crown or bridge, is in a large measure mechanical. True, there are many things in connection with the treatment of teeth that lie in the realm of dental science with which the layman is not familiar, but we submit that the dental profession is hardly to be classed in its confidential relation with the position of physician and

patient and lawyer and client, and when we come to analyze the remedy proposed by this legislation, in considering the mischief, does a danger actually exist? Is it of sufficient magnitude? Does it concern the public? Does the purported measure tend to remove it and is the restraint or requirement in proportion to the danger? These are the questions which, in the words of the Wisconsin Court, must be considered in determining whether there is a real mischief that needs remedying.

Adverting to the legislation in question, there are six prohibitions, as follows:

1. Advertising professional superiority or the performance of professional services in a superior manner.
2. Advertising prices for professional services.
3. Advertising by means of large display, glaring light signs or containing as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head.
4. Employing or making use of advertising solicitors or free publicity agents.
5. Advertising to guarantee any dental work.
6. Advertising to guarantee any dental operation painlessly.

Analyzing these various prohibitions, is there any serious danger to the public in any of these activities?

Adverting to Number 1, advertising professional superiority or the performance of professional services in a superior manner. Is there anything inherently dangerous to the public? We do know that in each profession

some stand out superior to others. In each profession we have men advertising their superiority. In the dental profession it is not wrong to specialize in extraction work exclusively or dental x-ray work exclusively, and ordinarily when a person desires teeth extracted he invariably goes to an extraction specialist and not to the general practitioner. In the medical profession we have the eye, ear, nose and throat specialist, we have the goitre specialist, and the tuberculosis specialist, all of whom advertise professional superiority. This is the day of the specialist. It is so in the law and it is so in the medical and dental profession. The specialist in criminal law is not called upon to handle corporation litigation, nor vice versa, and a man in the law profession who constantly practices personal injury litigation against defendants is not called upon in other lines of activity. To say that these men who specialize along these special lines cannot advertise their superiority is to take from the public information which the public has a right to know. It would prohibit the medical man from specializing in any subject and then advertising that through special work and years of endeavor along special lines he had fitted himself a little more competently than his brethren in a general practice. We submit that it is to the interest of the public to know who are specialists, to know their superiority along certain lines. It certainly cannot be claimed that such information is to the detriment of the public. If a dentist advertises professional superiority misleadingly or deceitfully, the statute in effect prior to the present enactment is amply sufficient to take care of such advertising,

but when a dentist advertises truthfully and honestly he feels himself more competent to engage along a special line and so advises the public through the regular channels, wherein is there any impairment of the general welfare of the public?

Adverting to the second prohibition, namely, advertising prices for professional services. Is this contrary to the general welfare if honestly and truthfully done? Many are the cases in our law books where the public has resisted payment of charges on the ground of excessiveness and we dare say in many cases the layman has been successful. Is it not in the interest of fair play and general welfare that a patient of a dentist should know what his charges are to be and not leave it to speculation, contention or litigation afterwards? The extraction of a tooth is pretty much the same in the various individuals. Certainly there can be no impairment of the general welfare in advertising the price of extraction or the price of a gold crown or the price of a lower or upper plate. There is no more impairment of the general welfare in advertising such prices as it is for the merchant to advertise the prices of his wares in the daily press.

Adverting to number 3, advertising by means of large display, glaring light signs or containing as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head, what is meant by large display or glaring light signs is left to speculation and conjecture. Certainly the representation of a tooth, teeth,

bridge work or any portion of the human head in no way injures the public health or the general welfare of the public.

Fourth, employing or making use of advertising solicitors or free publicity agents, the former law prohibited the use of "cappers" or "steerers" to obtain business.

Fifth, advertising to guarantee any dental work. It is to be noted that when the patient comes into the office the dentist has the right to guarantee that he will make good any defective work, but this law makes it unlawful for the dentist to advertise such fact through the ordinary channels. There is no law which prohibits either a doctor or dentist from guaranteeing his work. The great majority of our personal injury litigation is retained on a contingent basis. The dentist informs the patient that if the crown or bridge is not satisfactory he will replace it with one that is, and is not this in the interests of the public? It stabilizes the price which a patient must pay to the dentist and insures to the patient a satisfactory result. If anything can be said about it, it must be said that it is in the interest of the public and to the detriment of the particular dentist who gives the guarantee.

And lastly we come to number 6, advertising to guarantee any dental operation painlessly. In this day of anesthetics, local and general, dental work has become in a large measure painless. Cannot a dentist advertise that through the use of anesthetics, all of which now are in general use, the extraction of teeth has become practically

painless? Not only so, but the public cannot possibly be misled or the general welfare of the public impaired by advertisement that the extraction of teeth or the doing of dental work is painless. The public knows to what extent dental work subjects the patient to pain. In many of the states of the Union we have free dental work for the school child. We have it in the State of Oregon. In each grade school of the city of Portland we have a special nurse who examines the teeth of the children, makes her findings and report, and these children receive free dental service if desired. We submit that under the present day of social service and the performance of dental work in practically every home, such advertising has no tendency to disparage the public welfare.

Finally we would like to call attention to a few of the cases directly in point. This legislation, having sprung up the last few years, has been enacted in some six or seven states of the Union. Statutes are not altogether the same but they are akin in terminology.

The legislature of the State of Washington enacted a law prohibiting osteopaths from advertising. The act was held constitutional by the Supreme Court of Washington in the case of Laughney v. Maybury, 145 Wash. 146. An opposite view we believe has been taken in the following states:

Ohio: *Ex parte Craycroft*, 24 Ohio N. P. (N. S.) 513,
Texas: *Waller* v. *State*, 68 S. W. (2d) 601. Decided Jan. 29, 1934.

Colorado: *Chenoweth* v. *State Board of Medical Examiners*, 57 Colo. 74.

Illinois: *Kalman* v. *Walsh*, 355 Ill. 341-347.

See also *Schireson* v. *Walsh*, 354 Ill. 40, 187 N. E. 921.

In the State of New York, the legislature delegated to the trustees of the University of the State of New York the right to make rules and regulations in regard to the practice of dentistry. The trustees passed a regulation prohibiting advertising. The court of New York in the case of Brown v. University of the State of New York, 273 N. Y. S. 809, held that the trustees had no authority to pass a regulation prohibiting advertising. It is to be borne in mind that this decision did not pass upon the question as to whether or not the legislature had the authority to prohibit advertising.

We cite the following cases in point:

Legislation which denies the right to truthfully and honestly advertise as a means of securing patronage by professional men has been condemned as unconstitutional in the following cases:

In Chenoweth v. State Board, 57 Colo. 74, the court held:

> "In the statute under consideration, the mere publication of the advertisement, regardless of its tendency, is sufficient to authorize the revocation of the license, and it must be presumed that the action of the board was based solely upon the fact of the publication, as it was authorized to do by the language of the statute.

Under this statute, then, no matter how harmless or innocent may be the publication, nor what may be the chasteness of its language, nor the utter absence of any tendency to injure the morals of the public, yet the very fact of the publication of the advertisement is sufficient to take from a physician his license and the right to practice his profession. If this is to be justified under the statute, then the very basis upon which rest such statutes of regulation must be ignored. For such legislation is justified only upon the ground of police power and as tending to promote the public health, morals, safety, or general welfare.

* * *

"Advertisements by physicians may be regarded by certain members of the profession, as contrary to professional ethics, but with that Legislatures and courts may not be concerned. The Legislature has no power to confer the authority upon a Board of Medical Examiners to deny to a physician the right to advertise his business.

* * *

"The statute does not provide that a tendency to injuriously affect the public morals or welfare shall appear as an essential fact to be considered in connection with such an advertisement. Neither does the complaint so charge. All of this tends to convey the impression that the purpose of the provision under consideration was to enforce the ethical notions of some members of a profession rather than for the protection of the public at large.

* * *

"For these reasons we must conclude that the provisions of the statute that a physician's license may be revoked for 'causing the publication and circulation of an advertisement relative to any disease of the sexual organs' is in violation of the Fourteenth Amendment to the Constitution and Section 3, Art. 2, of our own Bill of Rights."

In the case of Ex Parte Robert C. Craycroft, 24 Ohio N. P. (N. S.) 513, the Ohio Court uses the following language:

"The profession of dentistry, like any other profession, is supposed to consist only of reputable men. The fact that every profession, whether it be law, medicine, theology, or dentistry, has among its members men who do not reach the standard of high moral qualifications demanded today by society, does not presume that these particular practitioners are disreputable or guilty of gross immoral conduct until they are proven to be such; * * *

"The public is in no way harmed by this class of advertisement, and why the law should place such strictures upon the profession of dentistry can not be explained, except that there is a class of dentists who advertise and a class who do not, just as there are druggists who cut their goods below market price, while others sell at the market price. Such a limitation upon the exercise of their rights is an unreasonable and arbitrary restriction upon a legitimate profession, and is a provision of the law which in no way operates to the benefit of the public health, safety or morals, and is certainly an abuse of legislative power.

"Such legislation is justified only upon the ground of police power and as tending to promote the public health, morals, safety or general welfare. Laws which impose penalties on persons and interfere with the personal liberty of the citizens can not be constitutionally enacted unless the public health, comfort, safety or welfare demands their enactment. It is for the Legislature to determine when an exigency exists for the exercise of this power, but it is for the courts to decide whether or not this power is properly exercised. The Legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and liberty of the individual citizen. When the police power is invoked for the purpose of regulating

a useful business, occupation or profession, and the mode in which that business is carried on or is advertised, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling and to do so in his own way, provided he does not encroach upon the rights of others, or trespass upon public morals, can not be taken away from him by legislative enactment.

* * *

"Advertisements by dentists may be regarded by certain members of the dental profession as contrary to professional ethics, but the Legislature and courts are not concerned with this view of the case. The Legislature has no power to confer the authority upon a board of dental examiners to deny to a dentist the right to advertise his business, and that is what the Legislature virtually has assumed to do when it enacted the aforementioned Sections 1325 and 1329-1."

In the case of Harris v. State Board of Optometrical Examiners, 287 Pa. 531, 535, we have a statute regulating the practice of optometry. The legislative purpose set forth in the statute was to guarantee the safety of the citizens and protect them from the hands of incompetent persons. The court says:

"Therefore, the manner, scope and extent of the practice are the subjects of legislative inquiry and control; but the regulations must be reasonable. The legislature under the police power does not possess the power to enact rules which have no substantial relation to the end to be attained. It cannot unreasonably prevent or limit the practitione. from acquiring the business for which he was licensed. Legislatures

do not have the power, under the guise of police regulation, to arbitrarily invade the personal right and liberty of the individual. Its determination of the extent of its power is not final or conclusive: White's App., 287 Pa. 259. If it pass an act, ostensibly in the exercise of the police power, but which unnecessarily interferes with the personal liberty of the citizen, the courts may examine the act and determine whether it relates to the objects which the exercise of the police power is designed to, and does, secure: White's App., supra; Chenowith v. State Board, 57 Colo. 74; Dobbins v. Los Angeles, 195 U. S. 233.

> "The matter or mode of exercising a lawful occupation may be regulated only in the interest of public health or to secure safety to the citizens. The legislature cannot adopt, as regulations, the ethics of the profession which may limit the practice to be secured or the method of procuring it."

In the case of Berry v. State, 135 S. W. 631 (Tex.), the statute authorized revocation of a license for grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public. The Texas court calls particular attention to the distinction between acts which are detrimental to the public welfare and acts which violate the ethical canons of the profession and held that the violation of the ethical canons of the profession cannot be dealt with by legislation. The court says:

> "The terms 'unprofessional' or 'dishonorable' conduct, used in the law of 1907, are qualified and modified by the language 'of a character likely to deceive or defraud the public,' to distinguish them from acts that are unprofessional or dishonorable under the code of ethics prescribed by the honorable profession of medicine that would not, directly, at least, react to the disadvantage of the public, such as not adver-

tising, of not entering into a consultatoin with an attending physician without his consent, and other acts that go to form and constitute the code of the honorable and upright practitioner of medicine. The law leaves the enforcement to the medical profession of its rules of ethics, and, however conducive they may be to creating and preserving the high standard of one of the most important and honored professions in the world, takes no cognizance of them, and does not seek to enforce them, except in so far as their infraction may infringe upon the rights and welfare of the public. But when the unprofessional conduct of the member of the medical profession is of such a character as to deceive or defraud the public, then the law denounces such conduct, and strips the offender of the means which make it possible to impose upon the credulous and unwary. Such unprofessional conduct would necessarily be closely allied to crime, because it is defrauding the public, and yet it was never intended to confine such conduct to the kind or class of offense that is denounced by the Criminal Code of Texas. That is provided for in a different subdivision of the statute from the one under which this case is prosecuted."

In Sapero v. State Board of Medical Examiners, 90 Colo 568-580, in a concurring opinion by Judge Butler, we have the following language:

"I concur in the decision, but wish to add to the reasons assigned for a reversal of the judgment one that seems to me to be too important to be overlooked.

"The right to revoke the license of a physician exists only by virtue of legislation enacted under the police power. To be valid, such legislation must bear a fair relation to the public health, safety, morals, or welfare, and tend to promote or protect the same. The Legislature has no power, under the guise of police

regulation, to arbitrarily invade the personal rights of an individual. It cannot provide for the revocation of a physician's license for a mere breach of ethics not involving moral turpitude or dishonorable conduct. The advertisements published by Sapero were entirely harmless, and could not injuriously affect the public health, safety, morals, or welfare. Their publication therefore did not justify the revocation of his license. While such publication may be considered unethical by some, or even many, physicians, and may even constitute ground for exclusion from a medical society, it no more justifies the revocation of a physician's license to practice than would a mere breach of etiquette, or the exhibition of table manners that do not conform to the usage of polite society.

"Such advertising does not come within the probition of the statute. If the statute attempted—and it does not—to make it a ground for the revocation of a physician's license, it would be unconstitutional and void. It is needless to cite more than one of the cases that support this proposition. Chenoweth v. State Board of Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915-D, 1188. The revocation of Sapero's license was an abuse of the board's discretion."

In Hewitt v. State Board of Medical Examiners, 148 Cal. 590-593, we have involved the validity of a statute which authorized revocation and forbid advertising of medical business in which grossly improbable statements were made. The court held the statute invalid and said:

"Under this provision the penalty of forfeiture of a physician's license is not made to depend upon falsity in fact of any matter contained in a statement, or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a ten-

dency to deceive the public or to impose upon credulous or ignorant persons, and so be harmful and injurious to public morals, health and safety. It is a matter of no moment under the provision of the act, and is entirely immaterial, whether the statement is true or false, beneficial or injurious. * * * The advertisement in connection with his medical business may be made in entirely good faith; the statement may be of such a character that it involves no moral delinquency on the part of the physician, nor in any degree tends to deceive or injure the public. These matters, however, have no controlling effect. If in the judgment of the board, such statements are 'grossly improbable' the right to practice is forfeited. Instead of furnishing some standard by which the physician can determine in advance what statements shall be treated as 'grossly improbable,' some definition of that term which will be a protection to him in his legal right to advertise his business, the statute, as far as his action is concerned, leaves that matter at large, but provides that after he had made the advertisement an ex post facto judgment of the board shall determine whether his statement is 'grossly improbable' or not."

While the Washington Supreme Court held in the case of Laughney v. Maybury case that the prohibition of all advertising by osteopaths was a proper enactment, yet the Washington Supreme Court had this matter under consideration at other times a somewhat similar situation and rather recognized that in order for an enactment to be invalid there must be some element of fraud and deceit in the advertisement. The case of State Board of Medical Examiners v. Macy, 92 Wash. 614-617, the court had under consideration a statute as follows:

"Third—All advertising of medical business which is intended or has a tendency to deceive the public or

impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety."

The court sustained this statute

"in view of the element of deceit in our statutory definition of unprofessional conduct."

The court distinguished that case from the Hewitt case (Calif.) because

"The element of tendency to deceive or intent to deceive found in the above quoted definition of our statute was apparently not present in the California statute, and this it might well be argued distinguishes that case from the one before us."

This is a recognition by the Washington court that the only advertising that can be lawfully condemned is such that is fraudulent or has a tendency to deceive and when such elements are incorporated into the statute.

The California statute was later amended to read as follows:

"All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety."

This statute was, in the case of Glass v. State Board of Medical Examiners, 50 Cal. App. 389-392, held valid because, as the court says:

"The legislation was evidently framed with the direct purpose and intention of stating a rule in conformity with the principles declared in the Hewitt case. Under these provisions a certificate could not be re-

voked unless it was first determined by the Board that the advertising complained of was in fact false and was intended or had a tendency to deceive the public or impose upon credulous or ignorant persons. * * *"

It would appear from this reasoning that the California Court would not sustain a statute which prohibited truthful and honest advertising.

In Aiton v. Board of Medical Examiners, 13 Ariz. 354-360, the Arizona Court sustained a statute regarding advertising, but took particular pains to point out the limits in such matters by using the following language:

"The Board of Health has no right to prescribe a code of medical ethics, and then declare a breach of that code unprofessional and dishonorable conduct; nor has it the right or power to deny to physicians the right to advertise their profession in the public press. The respondents (board) make no claim of any right to do either of these things. Their claim is that advertisements which tend to mislead and deceive the public constitute unprofessional and dishonorable conduct, and in this way they are within the purview of the law."

Again in the case of Ex Parte McNulty, 77 Cal. 164-168, 19 Pac. 237, Justice Thornton, in a concurring opinion, used the following language:

"I concur in the conclusion reached by Justice McFarland, and am inclined to concur in the reasons given by him for such conclusion. But I cannot hold that the legislature has the constitutional power to enact a law punishing a physician who has been decided to be competent to practice, as was the case with the petitioner here, when a certificate was issued to him,

for what is styled 'unprofessional conduct', and as advertising himself in a newspaper and in a printed pamphlet as a specialist in certain enumerated diseases. This goes beyond the police power, under which power the statute to be considered was enacted. That a rule of professional conduct by a board of medical men prohibiting such advertisements, and declaring them unprofessional, can be declared a misdemeanor, and punished, would extend the police power beyond whatever has been allowed. As well might the board declare that wearing any other hat than one of a white color, by a physician, should be unprofessional conduct, and cause it to be punished as a misdemeanor. The advertisement of the character mentioned does no harm to anyone. It may be of benefit to the public, by giving to the subjects of the diseases mentioned information of the existence and residence of a person who has peculiar skill in curing them. Such laws are passed to prevent injury to the community, not to prevent or exclude a benefit to it. We are told that at one time the able and celebrated Hannemann, a competent and properly licensed physician, was prosecuted and persecuted in a German state for compounding his own medicines, under a law enacted in the interest of apothecaries. I cannot conclude that such a statute here could be regarded as a valid exercise of power under our constitution. Professional etiquette prescribed by a class of men so eminent in standing as the medical practitioners of our state is a matter to be regarded and respected, but it has its limits, and I cannot conceive that a violation of it by a competent physician can ever be by the state made a penal offense. The rules in regard to such etiquette between the members of the medical, as between those of the legal, profession, must find their enforcement from a source other than the state. It is highly proper and just that it should be so. As the state cannot make the conduct of petitioner penal directly, it cannot do so indirectly. To hold as contended here by counsel adverse to the claims of petitioner would be to affirm the validity of a statute in which an attempt is seem-

ingly made to accomplish that indirectly which cannot be directly done. For the reasons given above, the petitioner, in my judgment, should be discharged from custody."

In the case of State Board of Medical Examiners v. Jordan, 92 Wash. 234-239, the Supreme Court of Washington said on this subject:

"Under our statute the defendant is not tried on the advertisement alone, but on the advertisement and his capacity, qualifications, or actions to fulfill it. The appeal to the Superior Court secures a trial de novo. In such trial a proper line of proof is not only the advertisement but the competence of the defendant to do what he advertises he can do. The issue then becomes like that in getting money by false pretenses which no Legislature has ever been required to define. The crime is determined not from the representations alone, but from all the actions and circumstances in which intent can be gathered.

"Our law has not prevented a practitioner from advertising cures or inviting the public to his healing, but only advertisements intended to beguile. It attacks not mere unethical conduct, but wrongful conduct. If from the testimony it appears that he either does not cure the diseases, never has cured them, cannot cure them, or does not know what they are, the law has then a right to say it is advertising to deceive. This fully explains why the California court, dissatisfied with 'grossly improbable statement', which would have made a mere academical or legal debate, was satisfied to suggest the present form for a different issue."

In the case of Yoshizawa v. Hewitt, 52 Fed. (2d) 411 the Ninth Circuit Court of Appeals said:

"Furthermore, it may be pointed out that there is a vast difference between unprofessional and dishon-

orable conduct, a phrase sometimes found in statutes of this nature, and the term gross and manifest incapacity. The former relates to 'professional ethics' and the personal conduct of the physician, while the latter relates to the physician's method of treatment and the degree of care exercised in the treatment of patients and the physician's skill and capacity properly to diagnose and treat such patients—terms that seem to have a well-defined meaning both in the law and in the medical profession."

Thus we submit that the enactment of this legislation is not in the interest of the public welfare but is an enactment of what is commonly denominated the ethics of the profession. It is a far stretch of the imagination to say that honest and truthful advertising either in a profession or in a business has a tendency to impair the general welfare. It is in the interests of the public to know more about the professions and it cannot be said or argued that the dissemination of knowledge and truth is injurious to the general welfare. It is said that the tendency of advertising is to commercialize the professions and the layman informs us that there is a tendency to commercialize the professions at the expense of the layman. It is much better for the profession and for the general public that the facts pertaining to the professions shall become known to the layman. The sentiment among some of the professions to take the public into their confidence and familiarize the public with the concepts of the professions certainly can bring no harm to the general welfare.

ARGUMENT IN SUPPORT OF JURISDICTION

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully shows that:

First.

The Supreme Court of the United States has jurisdiction in the appeal of this cause by virtue of a statute of the United States, namely, Section 237 of the Judicial Code, as amended and now published in U. S. Code, Title 28, Section 344.

Second.

This is an appeal from a final judgment of the Supreme Court of the State of Oregon, the highest court of the State of Oregon, and which judgment became final on the 11th day of September, 1934, on which date said court denied appellant's petition for rehearing.

Third.

The judgment appealed from upholds the constitutionality of a statute of the State of Oregon, the validity of which was drawn in question and challenged on the ground that it violates Section 1 of the XIVth Amendment of the Constitution of the United States. The cause originated on plaintiff-appellant's complaint, by which complaint appellant, a licensed, practicing dentist of Portland, Oregon, sought to enjoin a threatened enforcement of said statute, namely, Section 68-1013, Oregon Code Laws, 1930, as

amended by act of Oregon Legislature on March 1, 1933, said amendment being Section 2 of Chapter 166, Oregon Session Laws, 1933, page 208, which statute provides in part that any dentist may have his license revoked or suspended by the Board of Dental Examiners for unprofessional conduct, and states that unprofessional conduct shall mean, among other things, the following:

> "Advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

Said statute further provides that "The proceedings under this section may be taken by the board from the matters within its knowledge, or may be taken upon the information of another; provides, however, that if the informant is a member of the board, the other members of said board shall constitute the board for the purpose of finding judgment of the accused." The statute does provide for an appeal to the State courts from a decision of the Board of Dental Examiners, but as a condition to the right to appeal, it requires the accused first to furnish security for costs. Thus the statute permits the board to be both the accuser in a certain measure, and also allows the remaining members of the board to hear the charges.

Fourth.

The appellant here, plaintiff below, filed his complaint, a suit in equity, in the Circuit Court of the State of Oregon for Multnomah County, and therein alleged in substance that he has been a duly licensed dentist of the State of Oregon continually since the year 1918, and as such, since that time, has been engaged in practicing dentistry in the City of Portland, Oregon; that from the beginning of his practice he has used advertising methods now forbidden by the above quoted portion of said statute; that his advertising has always been made truthfully and honestly; that he has contracted in advance for such advertising with several firms and newspapers, which contracts ve a long period of time to run, and that he has obligated lf on other contracts with dental assistants and large e space; that a threatened enforcement of said statute would deprive him of his property without due process of law, in violation of Section 1 of Amendment XIV of the Constitution of the United States, together with allegations that said statute violates the organic State law of Oregon. The defendants below, respondents herein, filed a demurrer to said complaint, which demurrer was sustained by said lower court on the 19th day of October, 1933, on the express ground, among others, that said statute does not violate the Constitution of the United States. Whereupon appellant perfected an appeal from said lower court's ruling to the Supreme Court of the State of Oregon, which court on appeal also held said statute to be valid and not in violation of the United States Constitu-

tion. Accordingly the Supreme Court of the State of Oregon entered its judgment upholding said statute on June 26, 1934, whereupon appellant thereafter, and within time allowed by law and by the rules of the Supreme Court of the State of Oregon, duly filed in said Supreme Court his petition for rehearing, and said petition for rehearing was considered by the said Supreme Court of the State of Oregon and was by said court denied on the 11th day of September, 1934, and its said judgment is final.

Fifth.

The question as to the validity of the statute under consideration is of public importance. During the past two years several States have enacted similar statutes in an unique attempt to try to enact into statutory law the ethics of the American Dental Association, under the guise of police powers, and thereunder to empower a small group of politically appointed men on a dental board, on their own initiative, to revoke a fellow dentist's license for advertising his work or prices, even though he advertises them honestly. Such a statute attempts to do indirectly what could not be done directly. Quite obviously such a law is not for the benefit or welfare of the general public but is designed for the financial benefit of a portion of the dental profession and at the expense of the public. This is shown by the fact that there have been statutes in the past, and there are now statutes in a good many States making it unlawful for a dentist to use deceptive or fraudulent advertising. Oregon has had such a law since 1913

and appellant is heartily in accord, but it has only been in the immediate past that the State of Oregon, along with a few other States, has enacted a law making it unlawful for a dentist to advertise, even though the advertising is truthful and not fraudulent or deceptive.

There is a conflict in the decisions of the State courts as to the constitutionality of such a statute. The State courts of Ohio, Texas, Colorado and Illinois have declared statutes of like import to be unconstitutional:

Ohio: *Ex parte Craycroft*, 24 Ohio N. P. (N. S.) 513.

Texas: *Waller* v. *State*, 68 S. W. (2d) 601. Decided Jan. 29, 1934.

Colorado: *Chenoweth* v. *State Board of Medical Examiners*, 57 Colo. 74.

Illinois: *Kalman* v. *Walsh*, 353 Ill. 341-347.

Schireson v. *Walsh*, 354 Ill. 40.

whereas it has been held by the State of Washington that a statute of similar import is constitutional:

Laughney v. *Maybury*, 145 Wash. 146.

The question involved has not been considered or passed upon by the Supreme Court of the United States, and, in view of the conflict of State decisions, final ruling by this Court is highly desirable. The validity or invalidity of the statute in question is one of concern not only in the State of Oregon but in sister States where legislation of a like nature has of late been and is now being enacted.

In addition to the above, we believe the following cases support and sustain the jurisdiction of the United States Supreme Court in this case.

Bryant v. *Zimmerman*, 278 U. S. 63.
Blodgett v. *Silberman*, 277 U. S. 1.
Miller v. *Schoene*, 276 U. S. 272.
John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100.
Bandini Petroleum Co. v. *Superior Court of Cal.*, 284 U. S. 8.

The Supreme Court of Idaho, in the case of Abrams v. Jones, 35 Idaho, 532, had under consideration a statute wherein the dental examining committee ordered the hearing and recommended to the Commissioner the revocation of the dentist's license. The charges were formulated by the dental examining committee occupying the dual role of accuser and trier. The Supreme Court of Idaho, page 545, says:

> "Here we have the anomalous situation of a committee of ethical dentists, who are empowered to investigate the affairs of other members of their profession, upon written complaint of any licensed dentist, to make such expenditures of public moneys as may be necessary to that end, to prefer charges against dentists whom they regard as guilty of violations of the dental law, and then under the semblance of a hearing to sit in judgment upon and to condemn the accused. This dual role of the dental examining committee as both prosecutor and judge is repugnant to the spirit of American law, a fundamental principle of which is that no man shall be deprived of life, liberty or property without due process of law, and as was said in In re Cameron, 126 Tenn. 614, 151 S. W. 64,

at 76: 'Beyond question it is not according to due course of law to compel a man over his protest to try his case before a judge who has already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice.'

Due process of law is not necessarily satisfied by any process which the legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

We are bound to assume that in preferring the charges against respondent the dental examining committee had reasonable ground to believe that the charges were true, or in other words, that they had received evidence which appeared to justify the revocation of respondent's license under the dental law. It would then be manifestly unfair to require respondent to submit himself to a hearing before the committee, which had at least tentatively prejudged the matter as evidenced by the charges which it had brought against respondent. The committee was clearly disqualified, both in law and in fact, to give respondent a fair and impartial hearing, and this is the only hearing known to the law. It is of the highest importance that the actions, not only of the court but also of all other governmental agencies, should be free from reproach or the suspicion of unfairness. We attribute only the highest motives to the commissioner and the members of the committee. Nevertheless the fact remains that respondent was entitled to a hearing before an impartial body, and this right was denied when he was required to submit himself before a body which was at once his accuser, prosecutor and judge.

In Broom's Legal Maxims, 8th ed., pp. 94-99, it is said: 'It is a fundamental rule in the administration of justice that a person cannot be judge in a case where he is interested * * * * And therefore in the reign of James I it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his courts and give judgment on it himself * * * * And it is a maxim of law that no man can be at once judge and suitor.'

See, also, State Board of Health v. Ray, 22 R. I. 538, 48 Atl. 802; State v. Clancy, 30 Mont. 529, 77 Pac. 312; Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 Pac. 1056; Coke on Littleton, sec. 212.

In the case of Meyer v. City of San Diego, 121 Cal. 102, 66 Am. St. 22, 53 Pac. 434, 41 L. R. A. 762, the following language was used by the court: 'it is a principle which finds expression in the constitution of many of our states, which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy; for it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired'."

The tendency of this legislation is to take away from the citizens that freedom of action guaranteed to them by the fundamental law.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 538

HARRY SEMLER, *Appellant*,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, et al, etc., *Appellees*.

Appeal from the Supreme Court of the State of Oregon

Appellees' Brief

OPINION BELOW

The opinion of the Supreme Court of Oregon is found in case 2541, Oregon Advance Sheets, Volume 18, Page 1223, decided June 26, 1934, and is reported in 34 Pac. (2d) 311.

CONSIDERATION OF CASE ON MERITS

STATEMENT

A. PRELIMINARY. The defendants' demurred to the Complaint on the ground that the Complaint fails to state facts sufficient to constitute a cause of suit. The

Court sustained the Demurrer. The plaintiff refused to plead further; and thereupon the Court entered a Decree dismissing the Complaint and suit. Plaintiff appealed from the Decree of Dismissal.

The fact situation, out of which this litigation arose, is therefore found in the Complaint.

B. THE COMPLAINT. The Complaint, in substance, alleges the following:

The individual defendants are members of the Oregon State Board of Dental Examiners. On June 6, 1918, the Oregon State Board of Dental Examiners issued to plaintiff a Certificate licensing plaintiff to practice Dentistry in Oregon; and ever since the issuance of such license plaintiff has, in conformity with the statutes of Oregon, paid all license fees so as to entitle him to practice Dentistry. Since the issuance of the license in 1918 plaintiff has practiced Dentistry and maintained and still maintains an office in Portland, Oregon.

That all the time that plaintiff has been engaged in practice of Dentistry he advertised his business in the daily newspapers and other periodicals and by means of signs displayed on the windows and walls on the outside of the building in which he maintains his offices; in these advertisements plaintiff represented his professional skill and ability; plaintiff exercised his profession and occupation with a high degree of efficiency; and he acquired superior skill and ability and knowledge in the practice of dentistry and his ability to perform the professional

services of Dentistry in a superior manner; and also represented in said advertisements the prices that he would charge for various services to be rendered; some of the advertising was by means of large display signs, glaring light signs, and plaintiff used in connection with said avertisements pictures or illustrations of a tooth, teeth and bridge work; in connection with said advertising he employed the services of advertising solicitors who are engaged in the business of advertising and counseling and writing advertisements; in said advertisements plaintiff represented that he makes examinations for prospective patients without making any charge therefor; in said advertisements plaintiff represented and represents that he guarantees all dental work performed by him and represents that dental operations are performed painlessly and plaintiff has conducted for a long period of time, and now conducts this type of advertising. (See Paragraph VII of Complaint.)

Plaintiff has developed and acquired a very high degree of skill and ability in the practice of his profession of Dentistry in every branch thereof which is superior to the ability of the great majority of practicing Dentists, which superior ability has been acquired by a long and extensive training afforded by a very large practice; by reason of the advertising practices referred to above plaintiff has acquired a very large business with a very large number of patients; during the period of time that plaintiff has practiced his profession of Dentistry he has treated directly and there have been treated by his assistants under his supervision approximately Seventy-five Thous-

ands (75,000) patients; there are now being treated at his offices approximately One Hundred Fifty (150) patients daily who are treated by plaintiff and by assistants under the direct supervision of plaintiff; all assistants employed by plaintiff in his offices have always been duly licensed Dentists holding Certificates issued by the Oregon State Board of Dental Examiners; all the assistants employed by plaintiff at all times were selected with the highest degree of care and attention as to their ability to practice Dentistry and all employees selected did possess a very high degree of ability in the performance of all dental operations and were and are capable of and do render superior dental services; by reason of the large volume of business done by plaintiff it has become possible for him to standardize office management and operations, to purchase supplies and materials necessary for use in dental operations in large quantities and at prices a great deal lower than Dentists who are obliged to buy in small quantities; by reason of the vast amount of business performed plaintiff has been able to establish a uniform schedule of prices for the great majority of dental operations to be performed. (See Paragraph VIII of Complaint.)

Plaintiff's ability to standardize prices and to advertise fixed prices for definite dental operations is due to the fact that the prices of materials used in dental operations and in the manufacture and supplying of false teeth, bridge work and dental plates are standardized in the market; the materials purchased by plaintiff for use in his dental operations are always the very best and of

the highest quality obtainable in the market; by reason of the aforesaid facts plaintiff is enabled to represent truthfully, honestly and in good faith to the public by means of the advertisements that he possesses superior professional skill and ability in the performance of all dental operations involved in the practice of Dentistry, to represent truthfully, honestly and in good faith that he will perform certain dental operations at certain fixed prices and to represent in said advertisements truthfully, honestly and in good faith that he will guarantee all dental services performed by him or under his supervision and to represent in said advertisements truthfully, honestly and in good faith his ability to perform dental services painlessly, and all advertisements utilized by plaintiff, whether in the public press or periodicals or by means of signs of all kinds have always been and now are absolutely truthful and in good faith, with the intention of carrying out each and every of the representations contained therein. (See Paragraph IX of Complaint.)

By resorting to advertising of the type and in the nature described above plaintiff has been enabled to build up a very large and lucrative practice with a large number of patients, and by reason thereof it has become possible for plaintiff to reduce the price of dental service to the public continuously to a very material extent and plaintiff has thereby made it possible for a great many people to obtain needed dental services and attention, treatment and service who would otherwise have been unable to obtain the same if they were obliged to pay prices that must be charged by Dentists whose practice is lim-

ited to but a small number of patients; the plaintiff's practice of advertising in the manner described above has enabled him to render a very great and beneficial public service which has been and is of great benefit to the health, comfort and happiness of a great number of people who would otherwise have been deprived of the aid and assistance of competent and skilled Dentists. (See Paragraph X of Complaint.)

Without the practice of advertising in the manner described above it would have been and is impossible to build up a large practice so as to enable a dentist to effect the economies in operation that would enable the plaintiff, or any other Dentist, to render a high class of dental service at a very low price so as to make it possible for even the poorest people to obtain proper and adequate service. (See Paragraph XI of Complaint.)

By means of the type of advertising referred to in the Complaint plaintiff has built up and established a very lucrative and profitable business with a large following; and has expended a very large sum of money in said advertising; and if the Act of 1933 is enforced plaintiff's business will be destroyed or very materially impaired. (See Paragraph XIII of Complaint.)

Plaintiff entered into a contract with Oregon Neon Corporation, by the terms of which said Corporation constructed and hung upon the outer walls of plaintiff's offices a large neon illustrated sign advertising the plaintiff's business in the manner referred to above; plaintiff has obligated himself to maintain said sign for a period

of forty-four (44) months from October 1, 1932, and to pay therefor fifty dollars ($50.00) per month; the Act of 1933, if enforced, will render said neon sign useless and unlawful. (See Paragraph XIV of Complaint.)

Pursuant to the advertising practices followed by plaintiff he has entered into enforcible contracts with newspapers including the Oregonian, Daily Journal and the News-Telegram, to use a definite amount of space for advertising purposes for a definite period of time and plaintiff has obligated himself to pay therefor; if the 1933 Act is enforced it will become unlawful for plaintiff to utilize the space contracted for with said newspapers in the manner above indicated. (See Paragraph XV of Complaint.)

Pursuant to the advertising practices followed by plaintiff as aforesaid plaintiff entered into a lease for his offices in the Alisky Building in Portland, Oregon; the location of the said offices was selected by said plaintiff because it is in a thickly populated neighborhood and a much traveled district; plaintiff made a lease for said space for a period of ten (10) years and the lease was made because of its strategic location for advertising purposes; by reason of said location plaintiff obligated himself to pay a very high rental for said office space; if the 1933 Act is enforced plaintiff will be compelled to remove the advertising signs placed on the Alisky Building and the location will become valueless to the plaintiff as a means of attracting the attention of the public

to the representations contained on said signs. (See Paragraph XVI of Complaint.)

By reason of the advertising practices set forth in the complaint and the development of the plaintiff's business as a result thereof plaintiff was compelled to and did establish large offices and entered into contracts of employment with a large number of assistants; if the 1933 Act is enforced the business of plaintiff, as a result thereof, will become greatly diminished to such an extent that he will be compelled to abandon the equipment and offices established as aforesaid, the property contained therein will become useless and he will be compelled to breach the contracts entered into with employes and to discharge the same. (See Paragraph XVII of Complaint).

The foregoing is a complete and detailed statement of the fact situation as such fact situation is alleged in the Complaint.

C. Conclusions of Law Alleged in Complaint.

Based upon the foregoing alleged fact situation the plaintiff alleges in his Complaint as Conclusions of Law that Chapter 166 Laws 1933, amending Section 68-1013 Oregon Code, 1930, is unconstitutional and void because it contravenes the Federal and State Constitutions in that Chapter 166, Laws 1933: (1) deprives the plaintiff of property without due process of law: (2) impairs the obligation of plaintiff's contracts; (3) constitutes class legislation; (4) is so indefinite and uncertain as to be in-

capable of enforcement; and (5) denies to the plaintiff equal protection of the law. (See Paragraphs XVIII and XXI of Complaint.)

I.

THE OREGON STATUTE

For the convenience of the Court we here set down: (a) the statute in force at the time of the enactment of the 1933 Act; (b) all that portion of the 1933 Act, including the title, which is material here; and (c) an outline of that portion of the 1933 Act which relates to the grounds for revoking or suspending dental licenses.

A. SECTION 68-1013 OREGON CODE, 1930.

The Statute relating to grounds of suspension and revocation of dental licenses, hearing and appeal, in force when Chapter 166, Laws 1933, was enacted, reads as follows:

> Section 68-1013. "Any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes:
>
> 1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction or a certified copy thereof, certified by the clerk of the court or by the judge in whose court the conviction is had, shall be conclusive evidence.
>
> 2. For renting or loaning to any person his or her license or diploma to be used as a license or diploma of such person.

3. For unprofessional conduct, or for gross ignorance or inefficiency in his profession. Unprofessional conduct shall mean employing what are known as "cappers" or "steerers" to obtain business; the obtaining of any fee by fraud or misrepresentation; wilfully betraying professional secrets; employing directly or indirectly any student or any suspended or unlicensed dentist to perform operations of any kind, or to treat lesions of the human teeth or jaws, or correct malimposed formations thereof; the advertisement of dental business or treatment or devices in which untruthful and misleading, improbable or impossible statements are made; or habitual intemperance or gross immorality. The proceedings under this section may be taken by the board from the matters within its knowledge, or may be taken upon the information of another; provided, however, that if the informant is a member of the board, the other members of said board shall constitute the board for the purpose of finding judgment of the accused. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem it sufficient, make an order setting the same for hearing, and requiring the accused to appear and answer it at said hearing, at a specified time and place, and the secretary shall cause a copy of the order and of the accusation to be served upon the accused at least ten (10) days before the day appointed in the order for said hearing. The accused must appear at the time appointed in the order and answer the charges and make his defense to the same, unless for sufficient cause the board assign another day for that purpose. If he do not appear the board may proceed and determine the accusation in his absence. If the accused plead guilty or refuse to answer the charges, or, upon the hearing thereof, the board shall find them or any of them true, it may proceed to a judgment of either revoking his license or suspending it. The

board and the accused may have the benefit of counsel, and the board shall have power to administer oaths, take the depositions of witnesses in the manner provided by law in civil cases and compel them to attend before it in person the same as in civil cases, by subpoena issued over the signature of the secretary and the seal of the board and in the name of the people of the State of Oregon. Upon the revocation of any license the fact shall be noted upon the records of the board of dental examiners and the license shall be marked as canceled upon the date of its revocation. The secretary of the board shall, upon judgment of suspension or revocation being entered, transmit to the county recorder wherein the license of the licensee affected by such judgment is recorded a copy of such judgment order, for record, and the same shall be recorded in the same manner and in the same book wherein is kept the record of the certificate to practice dentistry. In case of the revocation of a license by the said board the licentiate whose license shall have been revoked by the said board shall have the right to appeal from said revocation within thirty days of the cancellation of said license. Such appeal shall be to the circuit court in and for the county in which was held the meeting of the board in which such revocation was made. In case a person desires to take such appeal he shall serve, or cause to be served, upon the secretary of said board, a written notice of such appeal, which shall contain a statement of the grounds of such appeal, and shall file in the office of such secretary an appeal bond with good and sufficient surety, to be approved by such secretary, to the state of Oregon, conditioned for the speedy prosecution of such appeal and the payment of such costs as may be charged against him upon such appeal. Said secretary, within ten days after the service of said notice of appeal, and the filing and approval of said bond, shall transmit to the clerk of the circuit court, to which said appeal is taken, a certified copy under the seal of said board of accusations on which the revo-

cation was based, the ground for appeal, together with the notice and bond of appeal. The clerk of such court shall thereupon docket such appeal cases and they shall be tried in all respects as ordinary civil actions and like proceedings shall be had thereon. Upon such appeal said cause shall be tried de novo. Either party may appeal from the judgment of this circuit court to the supreme court in the manner as civil actions may be appealed thereto. The judgment shall be stayed from the date of the approval of said bond until final determination of said appeal."

B. CHAPTER 166, LAWS 1933, AMENDING SECTION 68-1013, OREGON CODE, 1930.

Chapter 166, Laws 1933, amends two Sections of the Dental Statutes, including Section 68-1013, and repeals one section. Chapter 166, Laws 1933, is now material to the instant suit only to the extent that it affects Section 68-1013, Oregon Code, 1930. Chapter 166, Laws 1933, preserves the whole of Section 68-1013, except the following:

> "The advertisement of dental business or treatment or devices in which untruthful and misleading, improbable or impossible claims are made."

In lieu of the above omitted portion of Section 68-1013 the amendatory act of 1933 substitutes new matter, which for the convenience of the Court is italicized in the hereinafter reproduction of the amendatory act. The following is a complete copy of the title of Chapter 166, Laws 1933, and of the section which amends Section 68-1013:

"AN ACT"

To amend section 68-1004, and section 68-1013, Oregon Code 1930, relating to the practice of dentistry, and to repeal section 68-1014, Oregon Code 1930.

Section 2. That section 68-1013, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

Sec. 68-1013. Any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction or a certified copy thereof, certified by the clerk of the court or by the judge in whose court the conviction is had, shall be conclusive evidence.

2. For renting or loaning to any person his or her license or diploma to be used as a license or diploma of such person.

3. For unprofessional conduct, or for gross ignorance or inefficiency in his profession. Unprofessional conduct shall mean employing what are known as "cappers" or "steerers" to obtain business; the obtaining of any fee by fraud or misrepresentation; wilfully betraying professional secrets; employing directly or indirectly any student or any suspended or unlicensed dentist to perform operations of any kind, or to treat lesions of the human teeth or jaws, or correct malimposed formations thereof; *making use of any advertising statements of a character tending to deceive or mislead the public; advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or*

any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly; or habitual intemperance or gross immorality. The proceedings under this section may be taken by the board from the matters within its knowledge, or may be taken upon the information of another; provided, however, that if the informant is a member of the board, the other members of said board shall constitute the board for the purpose of finding judgment of the accused. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem it sufficient, make an order setting the same for hearing, and requiring the accused to appear and answer it at said hearing, at a specified time and place, and the secretary shall cause a copy of the order and of the accusation to be served upon the accused at least 10 days before the day appointed in the order for said hearing. The accused must appear at the time appointed in the order and answer the charges and make his defense to the same, unless for sufficient cause the board assign another day for that purpose. If he do not appear the board may proceed and determine the accusation in his absence. If the accused plead guilty or refuse to answer the charges, or, upon the hearing thereof, the board shall find them or any of them true, it may proceed to a judgment of either revoking his license or suspending it. The board and the accused may have the benefit of counsel, and the board shall have power to administer oaths, take the depositions of witnesses in the manner provided by law in civil cases and compel them to attend before it in person the same as in civil cases, by subpoena issued over the signature of the secretary and the seal of the board and in the name of the people of the state of Oregon. Upon the revo-

cation of any license the fact shall be noted upon the records of the board of dental examiners and the license shall be marked as canceled upon the date of its revocation. The secretary of the board shall, upon judgment of suspension or revocation being entered, transmit to the county recorder wherein the license of the licensee affected by such judgment is recorded a copy of such judgment order, certified to as such by said secretary of the board, for record, and the same shall be recorded in the same manner and in the same book wherein is kept the record of the certificate to practice dentistry. In case of the revocation of a license by the said board the licentiate whose license shall have been revoked by the said board shall have the right to appeal from said revocation within 30 days of the cancellation of said license. Such appeal shall be to the circuit court in and for the county in which was held the meeting of the board in which such revocation was made. In case a person desires to take such appeal he shall serve, or cause to be served, upon the secretary of said board a written notice of such appeal, which shall contain a statement of the grounds of such appeal, and shall file in the office of such secretary an appeal bond with good and sufficient surety, to be approved by such secretary, to the State of Oregon, conditioned for the speedy prosecution of such appeal and the payment of such costs as may be charged against him upon such appeal. Said secretary, within 10 days after the service of said notice of appeal, and the filing and approval of said bond, shall transmit to the clerk of the circuit court, to which said appeal is taken, a certified copy under the seal of said board of accusations on which the revocation was based, the ground for appeal, together with the notice and bond of appeal. The clerk of such court shall thereupon docket such appeal causes and they shall be tried in all respects as ordinary civil actions and like proceedings shall be had thereon. Upon such appeal said cause shall be tried de novo. Either party may appeal from the judgment of this circuit court to the

supreme court in the manner as civil actions may be appealed thereto. The judgment shall be stayed from the date of the approval of said bond until final determination of said appeal.

C. OUTLINE OF CHAPTER 166, LAWS 1933.

It may be of some assistance if the Act of 1933 is analyzed by presenting it in the form of an outline; for by so doing we shall be enabled to understand more readily each phase of the statute and we can better acquaint ourselves with the development of the legislation throughout the United States, the District of Columbia, Alaska and the Insular Possessions.

In preparing an outline of the statute we employ Roman and Arabic numerals and letters of the alphabet for the purpose of dividing the Act into parts and for the purpose of designating those parts. However, the wording and punctuation are reproduced in exact conformity with the statute as it appears in the volume containing the last enactments by the Regular 1933 Session.

The following is our outline of Chapter 166, Laws 1933, amending Section 68-1013, Oregon Code 1930:

OUTLINE OF CHAPTER 166, Laws 1933 (Amending Sec. 68-1013)

ANY DENTIST MAY HAVE HIS LICENSE REVOKED OR SUSPENDED BY THE BOARD OF DENTAL EXAMINERS FOR ANY OF THE FOLLOWING CAUSES:

I. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of

conviction or a certified copy thereof, certified by the clerk of the court or by the judge in whose court the conviction is had, shall be conclusive evidence.

II. For renting or loaning to any person his or her license or diploma to be used as a license or diploma of such person.

III. For

(a) unprofessional conduct, or for

(b) gross ignorance or

(c) inefficiency in his profession.

III—a. UNPROFESSIONAL CONDUCT SHALL MEAN

1. Employing what are known as "cappers" or "steerers" to obtain business;

2. the obtaining of any fee by fraud or misrepresentation;

3. wilfully betraying professional secrets;

4. employing directly or indirectly any student or any suspended or unlicensed dentist to perform operations of any kind, or to treat lesions of the human teeth or jaws, or correct malimposed formations thereof;

5. making use of any advertising statements of a character tending to deceive or mislead the public;

6. advertising professional superiority or the performance of professional services in a superior manner;

7. advertising prices for professional service;

8. advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head;

9. employing or making use of advertising solicitors or free publicity press agents;

10. or advertising any free dental work or free examination;

11. or advertising to guarantee any dental service;

12. or to perform any dental operation painlessly;

13. or habitual intemperance

14. or gross immorality.

II.

PROPRIETY OF CONSIDERING STATUES ENACTED BY OTHER STATES

(Points and Authorities)

1.

PROPRIETY OF CONSIDERING STATUTES OF OTHER STATES

Adams vs. Tanner, 244 U. S. 590, 599-600.

38 Harvard Law Review 6.

Mott on Due Process of Law Page 551, Sec 217, and Page 567, Sec. 224.

People vs. Perretta, 253 N. Y. 305; 171 N. E. 72; 84 A. L. R. 636, 639.

In Adams vs. Tanner, 244 U. S. 590, 599-600, Mr. Justice Brandeis in a dissenting opinion used the following language:

"It is necessary to inquire therefore; 'What was the evil which the people of Washington sought to correct?' Why was the particular remedy embodied in the Statute adopted? And, incidentally, what has

been the experience, if any, of other States or countries in this connection? But these inquiries are entered upon, not for the purpose of determining whether the remedy adopted was wise or even for the purpose of determining what the facts actually were. The decision of such questions lies with the legislative branch of the government. Powell v. Pennsylvania 127 6. U. S. 678, 685. The sole purpose of the inquiries is to enable the court to decide whether in view of the facts, actual or possible, the action of the State of Washington was so clearly arbitrary or so unreasonable, that it could not be taken 'by a free government without a violation of fundamental rights.' See McCroy v. U. S., 195 U. S. 27, 64."

2.

WHERE THE CONSTITUTIONAL VALIDITY OF A STATUTE DEPENDS UPON THE EXISTENCE OF FACTS, COURTS MUST BE CAUTIOUS ABOUT REACHING A CONCLUSION RESPECTING THEM CONTRARY TO THAT REACHED BY THE LEGISLATURE.

Fred Meyer, Inc. v. Keasey, 27 P. (2d) 311, 314.

3.

THE BURDEN OF PROOF IS ON THE PARTY WHO ASSAILS THE STATUTE AND THE STATUTE ASSAILED WILL NOT BE DECLARED UNCONSTITUTIONAL AND VOID UNLESS THE COURT IS CONVINCED BEYOND REASONABLE DOUBT.

McPherson v. Fisher, 28 P. (2d) 913, 914.

A LEGISLATIVE ENACTMENT IN THE EXERCISE OF THE POLICE POWER IS PRESUMED TO BE VALID.

Anderson v. Thomas, 26 P. (2d) 61.

People v. Monroe, 349 Ill. 270; 182 N. E. 439; 85 A. L. R. 605.

STATUTES OF FORTY-EIGHT STATES, DISTRICT OF COLUMBIA, ALASKA AND THE INSULAR POSSESSIONS.

Dentistry, Law and Medicine are learned professions; and since they are learned professions the relationship existing between the practitioner and the patient, or between the practitioner and the client is inherently different from the relationship between the tradesman and the customer, we should expect to find and we do find in each of the forty-eight states of the Union and in the District of Columbia, Alaska and the Insular Possessions legislation designed, in the interest of the general welfare, to protect the patient and the client in the confidential relationship created with the practitioner. The confidential phase of the relationship presents a situation which, because of its peculiar nature, requires protective and restrictive legislation.

Respondents have caused to be examined the statutes regulating the practice of Dentistry, Law and Medicine in the states of the Union and in the District of Colum-

bia, Alaska and the Insular Possessions. For convenience we here set down citations to the statutes of the different states, District of Columbia, Alaska and the Insular Possessions.

A. CITATIONS TO STATUTES OF FORTY-EIGHT STATES, DISTRICT OF COLUMBIA, ALASKA AND INSULAR POSSESSIONS.

The following citations indicate the statutes now in force in the forty-eight states, the District of Columbia, Alaska and Insular Possessions:

1. ALABAMA

(a)—Attorneys—Alabama Code of 1928, Sections 6256, 6257.

(b)—Physicians and Surgeons—Alabama Code of 1928, Section 2847.

(c)—Dentistry—Alabama Code of 1928, Section 333.

2. ARIZONA

(a)—Attorneys—Code of 1928, Section 201.

(b)—Physicians and Surgeons—Code of 1928, Section 2559.

(c)—Dentistry—Code of 1928, Section 2546.

3. ARKANSAS

(a)—Attorneys—Code of 1921, Section 610.

(b)—Physicians and Surgeons—Code of 1921, Section 8242.

(c)—Dentistry—Code of 1921, Sec. 3453.

4. CALIFORNIA

(a)—Attorneys—Code of Civil Procedure and Probate Code, Section 287, 1931.

(b)—Physicians and Surgeons—General Laws of 1931, Page 2362, Act 4807, Sec. 14.

(c)—Dentistry—Chapter 84, Laws 1933; and see Code. Deerings 1933 supplement, page 1311. Statute 1933, Page 529.

5. COLORADO

(a)—Attorneys—Vol. I, Page 1, Mills Annotated Statutes, Sections 290-291.

(b)—Physicians and Surgeons—Code of 1927, Section 6855.

(c)—Dentistry—Code of 1927, Section 2075.

6. CONNECTICUT

(a)—Attorneys—Vol. II, General Statutes (1930), Page 1676, Section 5346.

(b)—Physicians and Surgeons—General Statutes —Revision of 1930, Section 2741.

(c)—Dentistry—Revision of 1930, Section 2807.

7. DELAWARE

(a)—Attorneys—Revised Code of 1915, Chapter 112, Page 1713.

(b)—Physicians and Surgeons—Laws 1917, Page 143.

(c)—Dentistry—Laws 1933, Ch. 48, Page 250.

8. FLORIDA

(a)—Attorneys—Compiled General Laws 1927, Sec. 4172.

(b)—Physicians and Surgeons—Compiled General Laws 1927, Section 3415.

(c)—Dentistry—Section 3551, Compiled General Laws 1927.

9. GEORGIA

(a)—Attorneys—Code 1926 Annotated, Page 1453, Section 4967; Georgia Supplement 1932, pages 662 and 665.

(b)—Physicians and Surgeons—Code of 1926, Section 1697, Page 368.

(c)—Dentistry—Ga. Code 1926, Section 1754 (13 1-2).

10. IDAHO

(a)—Attorneys—Idaho Code of 1932, Section 3-301.

(b)—Physicians and Surgeons—Code of 1932, Section 53-2107.

(c)—Dentistry—Idaho Code of 1932, Section 53-1315.

11. INDIANA

(a)—Attorneys—Sections 1038, 1044, Annotated Statutes of 1926.

(b)—Physicians and Surgeons—Annotated Statutes of 1926, Section 12239.

(c)—Dentistry—An Act to amend and add New Sections, approved March 9, 1931, Chapter 169, Sec. 9, Laws 1931.

12. ILLINOIS

(a)—Attorneys—Revised Illinois Statutes 1931 (Cahill), Page 156, Par. 6.

(b)—Physicians and Surgeons—Revised Statutes 1931 (Cahill), Page 1838, Par. 17.

(c)—Dentistry—Revised Illinois Statutes 1931, Chap. 91 (Cahill), Par. 78. Laws Illinois 1933, Page 713, Sec. 186.

13. IOWA

(a)—Attorneys—Code of 1931, Section 10921.

(b)—Physicians and Surgeons—Code of 1931, Section 2492, 2493.

(c)—Dentistry—Code of 1931, Ch. 115, Sec. 2492-2493.

14. KANSAS

(a)—Attorneys—Revised Statutes of 1923, Section 7-111.

(b)—Physicians and Surgeons—Supplement to Revised Statutes of 1931, Section 65-1001.

(c)—Dentistry—Revised Code of 1931, Section 65-1407.

15. KENTUCKY

(a)—Attorneys—Carroll's Kentucky Statutes of 1930, Sec. 98-a-5.

(b)—Physicians and Surgeons—Carroll's Kentucky Statutes of 1930, Sec. 2615.

(c)—Dentistry—Carroll's Kentucky Statutes of 1930, Section 2636-6.

16. LOUISIANA

(a)—Attorneys—General Statutes (Dart) 1932, Sec. 464.

(b)—Physicians and Surgeons—General Statutes 1932, Sec. 9656.

(c)—Dentistry—General Statutes (Dart) 1932, Sec. 9516.

17. MARYLAND

(a)—Attorneys—Annotated Code (Bagby), Page 311.

(b)—Physicians and Surgeons—Annotated Code 1924, Page 1596.

(c)—Dentistry—State Dental Law of 1933, Effective June 1, 1933, Laws Maryland 1933, Ch. 564, Sec. 8.

18. MAINE

(a)—Attorneys—Revised Statutes, 1930, Page 1293.

(b)—Physicians and Surgeons—Revised Statutes, 1930.

(c)—Dentistry—Rev. St. of 1930, Sec. 34, Page 432 and Sec. 38, Page 433.

19. MASSACHUSETTS

(a)—Attorneys—Volume 2, page 2778, General Laws 1932.

(b)—Physicians and Surgeons—Volume 2, Page 3184, General Laws 1932 and Vol. I, Page 1374.

(c)—Dentistry—Volume 1, Page 1387, General Laws 1932.

20. MICHIGAN

(a)—Attorneys—Volume 3, Page 4869 (1929), Sec. 13585.

(b)—Physicians and Surgeons—Sec. 6739, Vol. I, Compiled Laws 1929.

(c)—Dentistry—Volume 2, Compiled Laws 1929, Sec. 6773.

21. MINNESOTA

(a)—Attorneys—Volume I, Page 1178, Mason's Statutes, 1927, Sec. 5697.

(b)—Physicians and Surgeons—Volume I, Page 1187, Mason's Statutes, 1927, Sec. 5707.

(c)—Dentistry—Mason's Statutes, 1927, Section 5760, Page 1195.

22. MISSOURI

(a)—Attorneys—Section 11707, Page 3139, Revised Statutes 1929.

(b)—Physicians and Surgeons—Section 9120, Page 2528, Revised Statutes 1929.

(c)—Dentistry—Section 13566, Revised Statutes 1929.

23. MISSISSIPPI

(a)—Attorneys—Section 3703, Page 1652, Mississippi Code 1930.

(b)—Physicians and Surgeons—Section 5863, Page 2435, Mississippi Code 1930.

(c)—Dentistry—Mississippi Code 1930, Section 4321.

24. MONTANA

(a)—Attorneys—Section 8961, Page 58, Volume III, Revised Codes 1921.

(b)—Physicians and Surgeons—Section 3119, Page 1159, Volume 1, Revised Codes 1921.

(c)—Dentistry—Rev. Codes 1921, Sec. 3115.

25. NEBRASKA

(a)—Attorneys—Section 7-106, Page 102, Compiled Statutes 1929.

(b)—Physicians and Surgeons—Section 71-601, Page 1342, Compiled Statutes 1929.

(c)—Dentistry—Compiled Statutes 1929, Sections 71-601, 71-602.

26. NEVADA

(a)—Attorneys—Section 604, Page 202, Volume I, Nevada Compiled Laws 1929.

(b)—Physicians and Surgeons—Section 4101, Page 1202, Compiled Laws 1929.

(c)—Dentistry—Section 2351, Page 717, Volume I, Compiled Laws 1929.

27. NEW JERSEY

(a)—Attorneys—Page 360, Laws 1930.

(b)—Physicians and Surgeons—Page 286, Laws 1927.

(c)—Dentistry—Chapter 146, Session Laws 1915.

28. NEW HAMPSHIRE

(a)—Attorneys—Page 1321, Volume II, Public Laws 1926.

(b)—Physicians and Surgeons—Page 794, Volume I, Public Laws 1926.

(c)—Dentistry—Page 797, Volume I, Public Laws 1926.

29. NEW MEXICO

(a)—Attorneys—Page 253, Section 9-135, Volume 18, Statutes 1929.

(b)—Physicians and Surgeons—Page 1410, Section 110-107, Volume 18, Statutes 1929.

(c)—Dentistry—Page 699, Section 37-106, Statutes 1929.

30. NEW YORK

(a)—Attorneys—Page 1285, Chapter 31, Cahill's Consolidated Laws 1930.

(b)—Physicians and Surgeons—Page 755, Chapter 15, Cahill's Consolidated Laws 1930.

(c)—Dentistry—Secs. 1300 to 1314 Dental Practice Act and rules effective March 16, 1933. (See Appendix A.)

31. NORTH CAROLINA

(a)—Attorneys—Page 50, Section 204, Volume 33, Code 1932.

(b)—Physicians and Surgeons—Page 24 Public Laws 1933 amending Section 6618, Consolidated Statutes.

(c)—Dentistry—Chapter 270, Public Laws 1933 amending Consolidated Statutes, Section 6649.

32. NORTH DAKOTA

(a)—Attorneys—Page 329, Section 800, Compiled Laws 1913-1925.

(b)—Physicians and Surgeons—Page 121, Section 468, Compiled Laws 1913-1925.

(c)—Dentistry—Compiled Laws 1913-1925, Sec. 510.

33. OHIO

(a)—Attorneys—Page 808, Section 1707, Volume 7, Throckmorton's Annotated Code 1930.

(b)—Physicians and Surgeons—Page 436, Section 1275, Volume 7, Throckmorton's Annotated Code 1930.

(c)—Dentistry—Act approved March 23, 1933, amending Section 1325 of the General Code.

34. OKLAHOMA

(a)—Attorneys—Page 1259, Volume 1, Oklahoma Statutes 1931.

(b)—Physicians and Surgeons—Pages 1367-1371, Volume I, Oklahoma Statutes 1931.

(c)—Dentistry—Page 1298, Section 4378, Volume I, Oklahoma Statutes 1931.

35. OREGON

(a)—Attorneys—Sections 32-501; 32-502; 32-503; 32-507; 32-508; 32-510 as amended by Chapter 233, Laws 1931, Oregon Code 1930.

(b)—Physicians and Surgeons—Chapter XXXI, Title LXVII, Oregon Code 1930, and Section 14-730 as amended by Chapter 367, Laws 1933.

(c)—Chapter 166, Laws 1933.

36. PENNSYLVANIA

(a)—Attorneys—Volume 17, Purdon's Statutes Annotated, Page 424.

(b)—Physicians and Surgeons—Page 339, Section 410, Volume 62-66, Purdon's Statutes Annotated.

(c)—Dentistry—Act of Assembly No. 76, approved May 1, 1933 (1933, May 1 P. S. 216, Sec. 5).

37. RHODE ISLAND

(a)—Attorneys—Section 4619 General Laws 1923.

(b)—Physicians and Surgeons—Pages 693 and 1359, General Laws 1923.

(c)—Dentistry—Page 737, Chapter 169, General Laws 1923.

38. SOUTH CAROLINA

(a)—Attorneys—Page 141, Section 323, Volume I, Code of Laws 1932.

(b)—Physicians and Surgeons—Page 1095, Section 5154, Volume II, Code of Laws 1932.

(c)—Dentistry—Code of Laws 1932, Sec. 5210.

39. SOUTH DAKOTA

(a)—Attorneys—Page 1514, Section 5271, Compiled Laws 1929.

(b)—Physicians and Surgeons—Page 2390, Section 7710, Compiled Laws 1929.

(c)—Dentistry—Compiled Laws 1929, Sec. 7751.

40. TENNESSEE

(a)—Attorneys—Page 1387, Section 9974, Volume 38, Code 1932.

(b)—Physicians and Surgeons—Page 848, Section 6932, Volume 38, Michie's Code 1932.

(c)—Dentistry—Sec. 6948, Michie's Code 1932.

41. TEXAS

(a)—Attorneys—Page 302, Section 313, Volume I, Vernon's Annotated Statutes.

(b)—Physicians and Surgeons—Pages 225 and 226, Sections 4506 and 4507, Volume 13, Vernon's Annotated Statutes 1925.

(c)—Dentistry—Page 243, Section 4549, Volume 13, Vernon's Annotated Statutes 1925.

42. UTAH

(a)—Attorneys—Page 180, Section 333, Title 7, Compiled Laws 1917.

(b)—Physicians and Surgeons—Page 279, Chapter 91, Laws 1921.

(c)—Dentistry—Section 2032.

43. VERMONT

(a)—Attorneys—Pages 351 and 1206, General Laws 1917.

(b)—Physicians and Surgeons—Page 1048, Chapter 257, General Laws 1917.

(c)—Dentistry—Pages 158-160, Laws 1931.

44. VIRGINIA

(a)—Attorneys—Page 126 of 1932 Supplement to Code of 1930.

(b)—Physicians and Surgeons—Page 355, Section 1614, Volume 26, Code 1930.

(c)—Dentistry—Section 1649.

45. WASHINGTON

(a)—Attorneys—Page 73, Volume 2, Remington's Revised Statutes 1931.

(b)—Physicians and Surgeons—Page 698, Volume 10, Remington's Revised Statutes 1931.

(c)—Dentistry—Section 10030-21, Remington's Revised Statutes 1931.

46. WEST VIRGINIA

(a)—Attorneys—Page 776, Section 2855, Code 1932.

(b)—Physicians and Surgeons—Page 784, Section 2871, Code 1932.

(c)—Section 2882, Code 1932.

47. WISCONSIN

(a)—Attorneys—Page 1957, Statutes 1931.

(b)—Physicians and Surgeons—Chapter 147, Page 1423, Statutes 1931.

(c)—Dentistry—Chapter 189, Laws 1933.

48. WYOMING

(a)—Attorneys—Chapter 9, Page 179, Revised Statutes 1931.

(b)—Physicians and Surgeons—Chapter 86, Page 1236, Revised Statutes 1931.

(c)—Dentistry — Sec. 34-109, Revised Statutes 1931.

49. ALASKA

(a)—Attorneys—Page 575, Chapter 76, Compiled Laws 1913.

(b)—Physicians and Surgeons—Page 19, Session Laws 1917, and Page 72, Chapter 28, Session Laws 1931.

(c)—Dentistry—Page 101, Session Laws 1929.

50. DISTRICT OF COLUMBIA

(a)—Attorneys—Page 64, Code of Laws amended to June 7, 1924.

(b)—Physicians and Surgeons—Volume 33, Acts of Congress, 70th Congress.

(c)—Dentistry—Vol. 33, Acts of Congress.

51. HAWAII

(a)—Attorneys — Section 2304, Revised Laws 1925.

(b)—Physicians and Surgeons—Section 1029, Revised Laws 1925.

(c)—Dentistry—Section 1080, Page 482, Volume I, Revised Laws 1925.

52. PHILIPPINE ISLANDS

(a)—Attorneys—Page 12, Chapter 2, Code of Civil Procedure, 1924.

(b)—Physicians and Surgeons—Page 978, Volume 2, Penal Code, 1930.

(c)—Dentistry — Page 978, Volume 2, Penal Code, 1930.

53. PORTO RICO

(a)—Attorneys—Page 53, Compilation Revised Statutes in force on March 9, 1911.

(b)—Physicians and Surgeons—Page 224, Art. 14, Laws 1931.

(c)—Dentistry—Page 552, Laws 1925.

B. STATES HAVING STATUTES EQUIVALENT TO OREGON STATUTE, Chapter 166, Laws 1933.

For the purpose of ascertaining the character of legislation affecting the three professions, and particularly

Dentistry, we have examined the statutes of Forty-eight States, the District of Columbia, Alaska, Hawaii, the Philippine Islands and Porto Rico; and we have examined all the statutes with reference to each of the parts of Chapter 166 Laws 1933 into which we have divided the Oregon statute, as shown in our outline. In some, and indeed many, instances the statutes of other states are identical with parts of the Oregon statute; while the remaining statutes examined are similar to and equivalent to parts of the Oregon statute. In New York Dentists are governed, not only by statutes, but by rules based upon statutes as is clearly explained in the opinion of the Attorney General of the State of New York, copy of which is attached to this brief as Appendix "A."

Under each part of the Oregon statute, as the parts are divided in our outline, we set down the names of the states having statutes covering such part, and also show which of the three professions is covered.

The following is a list of the states having statutes the same as, or equivalent to the Oregon Act of 1933:

I.

1. His Conviction of a Felony or Misdemeanor Involving Moral Turpitude:

ALASKA: *Dentistry,* Physicians and Surgeons and Attorneys.

ALABAMA: Attorneys and Physicians and Surgeons.

ARIZONA: Physicians and Surgeons and *Dentistry.*

ARKANSAS: Physicians and Surgeons and Attorneys.

CALIFORNIA: Attorneys, Physicians and Surgeons, *Dentistry.*

COLORADO: Physicians and Surgeons and *Dentistry.*

CONNECTICUT: Physicians and Surgeons.

DELAWARE: *Dentistry.*

FLORIDA: Physicians and Surgeons and *Dentistry.*

GEORGIA: Attorneys and Physicians and Surgeons.

HAWAII: *Dentistry* and Physicians and Surgeons.

IDAHO: *Dentistry,* Physicians and Surgeons and Attorneys.

INDIANA: Physicians and Surgeons, *Dentistry* and Attorneys.

ILLINOIS: Physicians and Surgeons.

IOWA: Physicians and Surgeons, Attorneys and *Dentistry.*

KANSAS: Physicians and Surgeons.

KENTUCKY: *Dentists.*

LOUISIANA: *Dentistry* and Physicians and Surgeons.

MAINE: *Dentistry* and Physicians and Surgeons.

MARYLAND: *Dentistry.*

MASSACHUSETTS: Physicians and Surgeons.

MICHIGAN: *Dentistry,* Physicians and Surgeons and Attorneys.

MINNESOTA: Physicians and Surgeons and Attorneys.

MISSISSIPPI: *Dentistry.*

MISSOURI: Attorneys.

MONTANA: Attorneys.

NEBRASKA: *Dentistry* and Physicians and Surgeons.

NEW HAMPSHIRE: Physicians and Surgeons.

NEW JERSEY: *Dentistry.*

NEW MEXICO: *Dentistry* and Attorneys.

NEW YORK: Physicians and Surgeons and Attorneys.

NORTH CAROLINA: *Dentistry.*

NORTH DAKOTA: *Dentistry,* Physicians and Surgeons and Attorneys.

OHIO: *Dentistry* and Attorneys.

OKLAHOMA: *Dentistry.*

PENNSYLVANIA: *Dentistry.*

PHILIPPINE ISLANDS: *Dentistry,* Attorneys and Physicians and Surgeons.

PORTO RICO: *Dentistry* and Physicians and Surgeons.

SOUTH DAKOTA: *Dentistry,* Physicians and Surgeons and Attorneys.

TENNESSEE: *Dentistry,* Physicians and Surgeons and Attorneys.

TEXAS: *Dentistry* and Physicians and Surgeons.

UTAH: *Dentistry,* Physicians and Surgeons and Attorneys.

VERMONT: Physicians and Surgeons.

VIRGINIA: *Dentistry* and Physicians and Surgeons.

WASHINGTON: *Dentistry*, Physicians and Surgeons and Attorneys.

WEST VIRGINIA: *Dentistry*, Physicians, Surgeons and Attorneys.

WISCONSIN: *Dentistry* and Physicians and Surgeons.

WYOMING: *Dentistry* and Attorneys.

Total number having statutes concerning one or more of the three learned professions: 46 States; Alaska; Hawaii; Philippines; Porto Rico.

Total number having *Dental* Statutes: 32 States; Alaska; Hawaii; Philippines; Porto Rico.

II.

For Renting or Loaning to any Person his or her License or Diploma to be Used as a License or Diploma of such Person.

ALASKA: *Dentistry.*

ARIZONA: Attorneys and Physicians and Surgeons.

CALIFORNIA: Attorneys.

INDIANA: *Dentistry.*

LOUISIANA: Physicians and Surgeons.

MARYLAND: *Dentistry.*

MICHIGAN: Physicians and Surgeons.

MONTANA: Attorneys.

OHIO: Physicians and Surgeons.

UTAH: Physicians and Surgeons, Attorneys.

WASHINGTON: Attorneys.

Total number having Statutes covering one or more of the three professions: 11 States; Alaska.

Total number having Statutes covering *Dentistry*: 2 States; Alaska.

III—a-1.

(a) Unprofessional Conduct:

(1) Employing what are known as "cappers" or "steerers" to obtain business:

ARIZONA: Attorneys.

CALIFORNIA: Physicians and Surgeons, *Dentistry*.

HAWAII: Physicians and Surgeons.

IDAHO: Physicians and Surgeons.

ILLINOIS: *Dentistry*.

IOWA: Physicians and Surgeons.

LOUISIANA: Physicians and Surgeons.

MICHIGAN: *Dentistry* and Physicians and Surgeons.

MISSOURI: Physicians and Surgeons.

NEBRASKA: Physicians and Surgeons.

OHIO: Physicians and Surgeons.

PHILIPPINE ISLANDS: Attorneys.

SOUTH DAKOTA: *Dentistry.*

TENNESSEE: Attorneys.

UTAH: *Dentistry.*

VIRGINIA: Attorneys.

WISCONSIN: *Dentistry* and Attorneys.

Total number of States having Statutes covering one or more of the three learned professions: 15 States; Hawaii.

Total number of States having Statutes covering *Dentistry*: 6 States

III—a-2.

(a) Unprofessional Conduct:

(2) The Obtaining of any Fee by Fraud or Misrepresentation:

ALASKA: *Dentistry.*

CALIFORNIA: *Dentistry.*

MICHIGAN: *Dentistry.*

NEVADA: *Dentistry.*

NORTH DAKOTA: *Dentistry.*

UTAH: *Dentistry.*

WISCONSIN: *Dentistry.*

Total number of States having Statutes covering *Dentistry*: 6 States; Alaska.

No States having Statutes covering other professions.

III—a-3.

(a) Unprofessional Conduct:

(3) Wilfully Betraying Professional Secrets:

ALASKA: *Dentistry* and Physicians and Surgeons.

ARIZONA: Physicians and Surgeons.

CALIFORNIA: Physicians and Surgeons and *Dentistry.*

HAWAII: Physicians and Surgeons.

IDAHO: Physicians and Surgeons.

IOWA: Physicians and Surgeons.

MICHIGAN: Physicians and Surgeons.

MINNESOTA: Physicians and Surgeons.

OHIO: Physicians and Surgeons.

PHILIPPINE ISLANDS: *Dentistry* and Physicians and Surgeons.

SOUTH DAKOTA: *Dentistry.*

TENNESSEE: Physicians and Surgeons.

UTAH: *Dentistry* and Physicians and Surgeons.

WISCONSIN: *Dentistry* and Physicians and Surgeons.

WASHINGTON: Physicians and Surgeons.

Total number of States having Statutes covering one or more of the three learned professions: 12 States; Alaska; Hawaii; Philippine Islands.

Total number of States having Statutes covering *Dentistry*: 4 States; Alaska; Philippine Islands.

III—a-4.

(a) Unprofessional Conduct:

(4) Employing Directly or Indirectly Any Student or Any Unlicensed Dentist to Perform Operations of Any Kind, or to Treat Lesions of the Human Teeth or Jaws, to Correct Malimposed Formations Thereof:

ALASKA: *Dentistry.*

ALABAMA: *Dentistry.*

ARIZONA: *Dentistry.*

ARKANSAS: *Dentistry.*

CALIFORNIA: Physicians and Surgeons and *Dentistry.*

COLORADO: *Dentistry.*

CONNECTICUT: *Dentistry.*

DELAWARE: *Dentistry.*

FLORIDA: *Dentistry.*

HAWAII: *Dentistry.*

IDAHO: *Dentistry,* Physicians and Surgeons.

INDIANA: *Dentistry.*

ILLINOIS: Physicians and Surgeons.

LOUISIANA: *Dentistry.*

MICHIGAN: *Dentistry.*

MINNESOTA: *Dentistry.*

MISSOURI: *Dentistry.*

MISSISSIPPI: *Dentistry.*

NEBRASKA: *Dentistry.*

NEW JERSEY: *Dentistry.*
NORTH CAROLINA: *Dentistry.*
OHIO: *Dentistry.*
OKLAHOMA: *Dentistry.*
PORTO RICO: *Dentistry.*
SOUTH CAROLINA: *Dentistry.*
TENNESSEE: *Dentistry.*
UTAH: *Dentistry.*
VIRGINIA: *Dentistry.*
WASHINGTON: *Dentistry.*
WISCONSIN: *Dentistry.*
WYOMING: *Dentistry.*

Total number having Statutes covering one or more of the three Learned Professions: 28 States; Alaska; Hawaii; Porto Rico.

Total number having Statutes covering *Dentistry*: 27 States; Alaska; Hawaii; Porto Rico.

III—a-5.

(a) Unprofessional Conduct:

(5) Making Use of Any Advertising Statements of a Character Tending to Deceive or Mislead the Public:

ALASKA: *Dentistry* and Physicians and Surgeons.
ALABAMA: Physicians and Surgeons and *Dentistry.*
ARIZONA: Physicians and Surgeons and *Dentistry.*

CALIFORNIA: Physicians and Surgeons.

CONNECTICUT: Physicians and Surgeons and *Dentistry.*

DELAWARE: *Dentistry.*

FLORIDA: Physicians and Surgeons and *Dentistry.*

HAWAII: *Dentistry* and Physicians and Surgeons.

IDAHO: *Dentistry* and Physicians and Surgeons.

ILLINOIS: *Dentistry.*

IOWA: *Dentistry* and Physicians and Surgeons.

KENTUCKY: *Dentistry.*

LOUISIANA: *Dentistry.*

MARYLAND: *Dentistry.*

MICHIGAN: *Dentistry* and Physicians and Surgeons.

MISSOURI: *Dentistry.*

MISSISSIPPI: *Dentistry.*

MONTANA: Physicians and Surgeons.

NEBRASKA: *Dentistry* and Physicians and Surgeons.

NEVADA: *Dentistry.*

NEW JERSEY: *Dentistry.*

NEW MEXICO: *Dentistry.*

NEW YORK: Physicians and Surgeons.

NORTH CAROLINA: *Dentistry.*

OHIO: *Dentistry,* Physicians and Surgeons.

OKLAHOMA: *Dentistry.*

PENNSYLVANIA: *Dentistry.*

PHILIPPINE ISLANDS: *Dentistry* and Physicians and Surgeons.

PORTO RICO: *Dentistry.*

SOUTH CAROLINA: *Dentistry.*

SOUTH DAKOTA: *Dentistry* and Physicians and Surgeons.

TENNESSEE: *Dentistry* and Physicians and Surgeons.

TEXAS: *Dentistry* and Physicians and Surgeons.

UTAH: *Dentistry* and Physicians and Surgeons.

VERMONT: *Dentistry* and Physicians and Surgeons.

VIRGINIA: *Dentistry* and Physicians and Surgeons.

WASHINGTON: *Dentistry* and Physicians and Surgeons.

WEST VIRGINIA: *Dentistry.*

WISCONSIN: *Dentistry.*

Total number having Statutes covering one or more of the Three Learned Professions: 38 States; Alaska; Hawaii; Philippine Islands and Porto Rico.

Total number having Statutes covering *Dentistry*: 35 States; Alaska; Hawaii; Philippine Islands and Porto Rico.

III—a-6.

(a) Unprofessional Conduct:

(6) Advertising Professional Superiority or the Performance of Professional Services in a Superior Manner:

ARKANSAS: Physicians and Surgeons—"Publicly advertising special ability to *treat* or cure chronic and incurable diseases." Code of 1921, Sec. 8242.

Dentistry—"Any claim of unusual skillfulness in the practice or any claim of skillfulness in the practice of any claim of any associate or employee, dentist or dental hygienist. Code of 1921, Sec. 3453.

DELAWARE: *Dentistry*—"That the holder thereof has advertised professional superiority or the performance of professional services in a superior manner." Laws 1933.

ILLINOIS: *Dentistry*—Dental Practice Act, Sec. 18 b. Revised Ill. Statutes 1931, Chap. 91, Sec. 78.

MARYLAND: *Dentistry*—"Advertising professional superiority or the performance of professional services in a superior manner." State Dental Law of 1933, effective June 1, 1933.

MINNESOTA: Physicians and Surgeons—"Advertising in any manner either in his own name or under the name of another person or concern, actual or pretended, in any newspaper, pamphlet, circular or other printed paper or document professional superiority to or greater skill than that possessed by fellow physicians and surgeons." Mason's Statutes, 1927, Vol. 1, Page 1187.

NEW YORK: *Dentistry*—"Advertising professional superiority or the performance of professional services in a superior manner." Sections 1300 to 1314, Dental Practice Act, and Rules effective March 16, 1933. (See Appendix A)

OHIO: *Dentistry*—Act of March 23, 1933—"Wilfully advertises or publishes grossly false, fraudulent or misleading statements of his superior skill or knowledge or his methods of treatment or prac-

tice." Act approved March 23, 1933, amending Section 1325 of the General Code.

WISCONSIN: Chapter 189, Laws 1933.

Total number having Statutes covering one or more of the Three Learned Professions: 8 States.

Total number having Statutes covering *Dentistry*: 7 States:

III—a-7.

(a) Unprofessional Conduct:

(7) Advertising Prices for Professional Service:

DELAWARE: *Dentistry*—"That the holder thereof has advertised in any manner whatsoever or exposed to public view definite, fixed prices where the nature of the professional service rendered and the materials required must be variable." (Act of April 6, 1933), Laws 1933.

ILLINOIS: *Dentistry*—Dental Practice Act, Sec. 18 b.—"Advertise any amount as a price or fee for the service or services of any person engaged as principal or agent in the practice of dentistry or for any material or materials whatsoever used or to be used." Revised Illinois Statutes 1931, Chap. 91, Sec. 78.

MARYLAND: *Dentistry*—"Advertising definite fixed prices where the nature of the professional service to be rendered and the materials required must be variable." State Dental Law of 1933, effective June 1, 1933.

NEW YORK: *Dentistry*—"Advertising definite fixed prices where the nature of the professional

service rendered and the materials required must be variable." Secs. 1300 to 1314, Dental Practice Act, and rules effective March 16, 1933. (See Appendix A)

WISCONSIN: *Dentistry*—Chapter 189, Laws 1933.

Total number having Statutes covering one or more or the Three Learned Professions: 3 States.

Total number having Statutes covering *Dentistry*: 3 States.

III—a-8.

(a) Unprofessional Conduct:

(8) Advertising by Means of a Large Display, Glaring Light Signs, or Containing as a Part Thereof the Representation of a Tooth, Teeth, Bridge Work or Any Portion of the Human Head:

DELAWARE: *Dentistry*—"That the holder thereof has advertised by means of large display, glaring illuminated or flickering light signs, or has advertised with signs or printed advertisements containing as a part thereof the representation of a tooth, teeth, dental restorations, any portion of the human head or neck, or photographs of any person." (Act of April 6, 1933), Laws 1933.

ILLINOIS: *Dentistry*—Dental Practice Act, Sec. 18 b. Revised Illinois Statutes 1931, Chap 91, Sec. 78.

NEW YORK: *Dentistry*—"Advertising by means of large display, glaring illuminated or flickering light signs or containing as a part thereof the representation of a tooth, teeth, bridge work or any por-

tion of the human head." (Rule 4 adopted by the Board of Regents governing dental advertising.) Secs. 1800 to 1814, Dental Practice Act, and rules effective March 16, 1933. (See Appendix A)

WISCONSIN: *Dentistry*—Chapter 189, Laws 1933 (almost identical with Oregon Statute).

Total number having Statutes covering *Dentistry*: 4 States. No Statutes covering other professions.

III.—a-9.

(a) Unprofessional Conduct:

(9). Employing or Making Use of Advertising Solicitors or Free Publicity Press Agents:

DELAWARE: *Dentistry*—"That the holder thereof has employed or made use of advertising solicitors or free publicity press agents." Laws, 1933.

GEORGIA: Attorneys—"Any attorney-at-law who solicits legal employment as defined in Section 4933 (b), by any means, either directly or indirectly, through another, shall be deemed guilty of corrupt and deceitful practice." Code 1926 Annotated, Page 1458, Sec. 4967; Georgia Supplement 1932, Pages 662 and 665.

ILLINOIS: *Dentistry*—Chapter 189, Laws 1933. Revised Illinois Statutes 1931, Chap 91, Sec. 78.

IOWA: Attorneys—"Soliciting legal business for himself or office, either by himself or representative. Nothing herein contained shall be construed to prevent or prohibit listing in legal or other directories, law lists, or other similar publication or

the publication of professional cards in any such lists, directories, newspapers or other publications." Code of 1931, Sec. 10921.

MARYLAND: *Dentistry*—(Maryland State Dental Law, 1933)—"The employment or making use of advertising solicitors or of free public press agents." State Dental Law of 1933, effective June, 1933.

MICHIGAN: Physicians and Surgeons—"Subsidizing any hotel or boarding house for a like purpose (securing patients) or paying, or offering to any person money, or any other thing of value with a like purpose, or advertising to do so in any form whatsoever; or the division of fees in a consultation, or a reference of a patient to a specialist, when no actual professional service is rendered by the physician referring the case, without the knowledge of the patient or the person concerned in the payment thereof." Compiled Laws 1915, Vol. 2, Division 8, Page 2444.

MISSOURI: Physicians and Surgeons—"Soliciting patronage by agents shall be deemed unprofessional and dishonorable conduct." Revised Statutes 1929, Sec. 9120, Page 2523.

NEW YORK: *Dentistry*—"Employing or making use of advertising solicitors or free publicity press agents." Secs. 1300 to 1314, Dental Practice Act, and rules effective March 16, 1933. (Appendix A)

TENNESSEE: Attorneys—"Who shall seek out any person having a claim for personal injury or having any other ground of action in order to obtain employment by such claimant, or shall employ agents or runners for like purposes, or pay or reward, directly or indirectly, those who bring or influence

the bringing of such cases to him or his office." Code 1932, Vol. 38, Sec. 9974, Page 1387.

Total number having Statutes covering one or more of the Three Learned Professions: 8 States.

Total number having Statutes covering *Dentistry*: 3 States.

III—a-10.

(a) Unprofessional Conduct:

(10) Or Advertising any Free Dental Work or Free Examination:

OREGON: *Dentistry.* Chap. 166, Laws 1933.

ILLINOIS: *Dentistry*—"Or to advertise free dental services or examinations as an inducement to secure dental patronage." Revised Illinois Statutes 1931, Chap. 91, Sec. 78.

III—a-11.

(a) Unprofessional Conduct:

(11) Or Advertising to Guarantee any Dental Service:

OREGON: *Dentistry.* Chap. 166, Laws 1933.

III—a-12.

(a) Unprofessional Conduct:

(12) Or to Perform any Dental Operation Painlessly.

ALABAMA: *Dentistry*—"If the person holding such certificate shall advertise to practice without causing pain." Alabama Code of 1929, Sec. 333.

ARKANSAS: *Dentistry*—"For the publication or circulation of any advertisement setting forth any claim to practice painless dentistry." Code of 1921, Sec. 3453.

DELAWARE: *Dentistry*—"Advertising to perform painless operation of a dental or surgical nature." Act of April 6, 1933; Laws 1933.

ILLINOIS: *Dentistry*—"Or in any way to advertise to practice dentistry without causing pain." Revised Illinois Statutes 1931, Chap. 91, Sec. 78.

KENTUCKY: *Dentistry*—"Advertise to practice dentistry without causing pain." Statutes of 1930, Sec. 2636-6.

MARYLAND: *Dentistry*—(Maryland State Dental Law 1933)—"The advertising to practice dentistry without causing pain." State Dental Law of 1933, effective June 1, 1933.

MISSOURI: *Dentistry*—"Upon the publication or circulation by letters, circulars, newspapers, cards or otherwise where the licensee or person holding a certificate holds himself out to the public as a practitioner without causing pain." Revised Statutes 1929, Sec. 5493.

MISSISSIPPI: *Dentistry*—"Advertising to practice dentistry without causing pain." Mississippi Code 1930, Sec. 4321.

TENNESSEE: *Dentistry*—"Advertise to practice dentistry without causing pain." Michie's Code 1932, Sec. 6948.

VERMONT: *Dentistry*—"Advertising to practice dentistry without causing pain." Laws 1931, Pages 158-160.

WEST VIRGINIA: *Dentistry*—"If the person holding such license shall advertise to practice dentistry without causing pain." Sec. 2882, Code 1932.

Total number having Statutes covering one or more of the Three Learned Professions: 11 States.

Total number having Statutes covering *Dentistry*: 10 States.

III—a-13.

(a) Unprofessional Conduct:

(13) Or Habitual Intemperance:

ALASKA: *Dentistry* and Physicians and Surgeons.

ALABAMA: *Dentistry* and Physicians and Surgeons.

ARIZONA: *Dentistry* and Physicians and Surgeons.

ARKANSAS: *Dentistry* and Physicians and Surgeons.

CALIFORNIA: *Dentistry* and Physicians and Surgeons.

COLORADO: *Dentistry* and Physicians and Surgeons.

CONNECTICUT: Physicians and Surgeons.

DELAWARE: *Dentistry*.

FLORIDA: *Dentistry*, Physicians and Surgeons and Attorneys.

GEORGIA: Physicians and Surgeons.

HAWAII: Physicians and Surgeons.

IDAHO: *Dentistry,* Physicians and Surgeons and Attorneys.

INDIANA: Physicians and Surgeons and *Dentistry.*

ILLINOIS: Physicians and Surgeons.

IOWA: *Dentistry* and Physicians and Surgeons.

KANSAS: Physicians and Surgeons.

KENTUCKY: *Dentists* and Physicians and Surgeons.

LOUISIANA: *Dentistry* and Physicians and Surgeons.

MAINE: *Dentistry.*

MASSACHUSETTS: Physicians and Surgeons.

MICHIGAN: *Dentistry* and Physicians and Surgeons.

MISSOURI: *Dentistry* and Physicians and Surgeons.

MISSISSIPPI: *Dentistry.*

NEBRASKA: *Dentistry* and Physicians and Surgeons.

NEW JERSEY: *Dentistry.*

NEW MEXICO: *Dentistry.*

NEW YORK: Physicians and Surgeons.

NORTH CAROLINA: *Dentistry.*

NORTH DAKOTA: *Dentistry* and Physicians and Surgeons.

OHIO: *Dentistry.*

OKLAHOMA: *Dentistry.*

PENNSYLVANIA: *Dentistry.*

PHILIPPINE ISLANDS: Physicians and Surgeons and *Dentistry.*

PORTO RICO: *Dentistry* and Physicians and Surgeons.

SOUTH CAROLINA: *Dentistry.*

SOUTH DAKOTA: *Dentistry.*

TENNESSEE: *Dentistry* and Physicians and Surgeons.

TEXAS: Physicians and Surgeons.

UTAH: *Dentistry* and Physicians and Surgeons.

VIRGINIA: *Dentistry.*

WASHINGTON: *Dentistry* and Physicians and Surgeons.

WEST VIRGINIA: *Dentistry* and Physicians and Surgeons.

WYOMING: *Dentistry.*

Total number having Statutes covering one or more of the Three Learned Professions: 39 States; Alaska; Hawaii; Porto Rico; Philippine Islands.

Total number having Statutes covering *Dentistry*: 32 States; Alaska; Philippine Islands; Porto Rico.

III—a-14.

(a) Unprofessional Conduct:

(14) Or Gross Immorality:

ALASKA: *Dentistry.*

ALABAMA: Physicians and Surgeons and *Dentistry.*

ARIZONA: *Dentistry.*
CALIFORNIA: *Dentistry.*
COLORADO: *Dentistry.*
CONNECTICUT: Physicians and Surgeons.
FLORIDA: *Dentistry* and Attorneys.
INDIANA: Physicians and Surgeons.
IOWA: *Dentistry,* Physicians and Surgeons.
KANSAS: Physicians and Surgeons.
MICHIGAN: *Dentistry.*
MISSOURI: *Dentistry.*
MISSISSIPPI: *Dentistry.*
MONTANA: Physicians and Surgeons.
NEBRASKA: Physicians and Surgeons.
NEW YORK: *Dentistry.*
NORTH CAROLINA: *Dentistry.*
NORTH DAKOTA: *Dentistry.*
OHIO: *Dentistry.*
PORTO RICO: Physicians and Surgeons.
RHODE ISLAND: *Dentistry.*
UTAH: *Dentistry.*
WEST VIRGINIA: Physicians and Surgeons.
WISCONSIN: *Dentistry.*

Total number having Statutes covering one or more of the three Learned Professions: 22 States; Alaska; Porto Rico.

Total number having Statutes covering *Dentistry*: 16 States; Alaska; Porto Rico.

III—b.

(b) Gross Ignorance:

ALASKA: *Dentistry.*

ARIZONA: *Dentistry.*

CALIFORNIA: *Dentistry.*

COLORADO: Physicians and Surgeons.

FLORIDA: *Dentistry.*

MICHIGAN: *Dentistry.*

MISSISSIPPI: *Dentistry.*

NEW YORK: *Dentistry.*

NORTH CAROLINA: *Dentistry.*

UTAH: *Dentistry.*

VIRGINIA: *Dentistry.*

Total number having Statutes covering one or more of the Three Learned Professions: 11 States; Alaska.

Total number having Statutes covering *Dentistry*: 10 States; Alaska.

III-c.

(c) INEFFICIENCY IN HIS PROFESSION.

ALASKA: *Dentistry.*

ARIZONA: *Dentistry.*

CALIFORNIA: *Dentistry.*

COLORADO: *Dentistry* and Physicians and Surgeons.

CONNECTICUT: Physicians and Surgeons and *Dentistry.*

FLORIDA: *Dentistry.*

GEORGIA: *Dentistry.*

HAWAII: Physicians and Surgeons.

IOWA: Physicians and Surgeons.

LOUISIANA: Physicians and Surgeons.

MICHIGAN: *Dentistry.*

MISSISSIPPI: *Dentistry.*

NEW YORK: *Dentistry.*

NORTH CAROLINA: *Dentistry.*

NORTH DAKOTA: *Dentistry.*

VIRGINIA: *Dentistry.*

WASHINGTON: Attorneys.

Total number having Statutes covering one or more of the Learned Professions: 15 States; Alaska; Hawaii.

Total number having Statutes covering *Dentistry*: 11 States; Alaska.

C. MISCELLANEOUS STATUTES CONCERNING ADVERTISING.

A considerable volume of legislation has been enacted by many states concerning advertising in the three professions, where such legislation cannot with any fair degree of accuracy be assigned to any one part of the outline made of the Oregon Statute; and consequently we reproduce as Appendix C the material portions of such

legislation and refer to it as Miscellaneous Statutes concerning advertising.

D. RECENT DENTAL LEGISLATION REGULATING PRACTICE OF DENTISTRY.

The strong desire upon the part of some practitioners to commercialize dentistry in the various States in the Union brought into existence practice harmful to the general welfare; and because of these objectionable practices, some of which, because of the nature of the profession, have been peculiar to dentistry alone, drastic legislation has been enacted in recent years, and, indeed, it is a noteworthy fact that in 1933 several of the states enacted statutes relating to dentistry and covering phases identical with or equivalent to parts of the Oregon Statute now assailed by appellant.

As stated by the Attorney General of the State of New York in an opinion rendered on October 11, 1933 (see Appendix "A"):

> "It (New York Dental Act) was enacted for the purpose of licensing the qualified and protecting the afflicted from the pretention of the ignorant, the unskilled, the unscrupulous and the unlicensed. It was designed to prohibit and punish fraud and deception and to bring the practice under such control that, so far as possible, the ignorant, the unscientific, the unskilled and the unscrupulous practitioner might be excluded. • • • •"
>
> "With each amendment (of the original statute) came a definite strengthening of the laws with a view

to maintaining adequate qualifications for admission to practice dentistry, proper standards for practice, and sufficient enforcement machinery."

And, again (see Appendix "A"), as stated by the New York Attorney General:

"The rules have basis in reason. Their aim is to maintain high professional standards, to keep unsullied the integrity of the dental profession by preventing abuses, to protect the public from fraud which may result from advertising which may appear to be honest and truthful and to prohibit the modern tendency to commercialize the profession. (Brooks v. State, 146 Ala. 153; Griffin v. Powers, 152 Tenn. 55, affd. 275 U. S. 495.)"

And, again, in the same opinion the Attorney General states:

"As the professions in arts and sciences advance for the benefit of mankind they should not be retarded by commercialism. When it is ascertained by a Board, duly empowered to issue licenses and to revoke them for unprofessional conduct, that any practices of the licensees are detrimental to the public such practices may be declared unprofessional despite the fact that they may have been tolerated in the past. Such prior tolerance does not give any vested right to a licensee to continue, in the future, practices which are found to be unprofessional. Though a license issued to a Dentist to practice his profession is a property right of which he cannot be deprived arbitrarily, it is nevertheless a privilege subordinate to the duty of the state to protect the public health. Hawker v. New York, 170 U. S. 189."

For convenience and in order that some of the recent dental legislation may be presented in a compact form, we here exemplify some of the recent dental legislation containing prohibitions against advertising which are either identical with or similar to, or in principle not different from the Oregon Statute.

1. DELAWARE—Act approved April 6, 1933. Laws 1933, Chapter 48.

Subdivisions 6, 7, 8 and 9 of the 1933 Delaware Act read as follows:

6. That the holder thereof has advertised professional superiority or the performance of professional services in a superior manner, or advertised to perform painless operations of a dental or surgical nature.

7. That the holder thereof has advertised in any manner whatsoever or exposed to public view definite fixed prices when the nature of the professional service rendered and the materials required must be variable.

8. That the holder thereof has advertised by means of large display, glaring, illuminated or flickering light signs, or has advertised with signs or printed advertisements, containing as a part thereof the representation of a tooth, teeth, dental restorations, any portion of the human head or neck, or photographs of any person.

9. That the holder thereof has employed or made use of advertising solicitors or free publicity press agents.

2. ILLINOIS. Laws 1933, Page 713.

Subdivision 5 of Section 7 of the Illinois Dental Practice Act prohibits:

"Division of fees or agreeing to split or divide the fees received for dental services with any person for bringing or referring a patient or assisting in the care or treatment of a patient without the knowledge of said patient or his legal representative."

Section 18b of the Illinois Dental Practice Act reads as follows:

"18b. It shall be unlawful for any person, firm or corporation to publish, directly or indirectly, or circulate any fraudulent, false or misleading statements as to the skill or method of practice of any person or operator; or in any way to advertise to practice dentistry without causing pain; or to advertise in any manner with a view of deceiving the public, or in any way that will tend to deceive or defraud the public; or to claim superiority over neighboring dental practitioners; or to publish reports of cases or certificates of same in any public advertising media; or to advertise as using any anesthetic, drug, formula, material, medicine, method or system which is either falsely advertised or misnamed; or to advertise free dental services or examinations as an inducement to secure dental patronage; or to advertise any amount as a price or fee for the service or services of any person engaged as principal or agent in the practice of dentistry, or for any material or materials whatsoever used or to be used; or to employ "cappers" or "steerers" to obtain patronage or to exhibit or use specimens of dental work, posters, or any other media calling attention of the public to any person engaged in the practice of dentistry; or to give a public demonstration of skill or methods of prac-

ticing dentistry upon or along the streets or highways, or any place other than his office where he is known to be regularly engaged in the practice of his profession; and any person committing an offense against any of the provisions of this section shall, upon conviction, be subjected to such penalties as are provided in this Act; provided, that any person licensed under this Act may announce by way of a professional card containing only the name, title, degree, office location, office hours, phone number, and residence address and phone number, if desired, and if he limits his practice to a specialty he may announce it, but such card shall not be greater in size than three and one-half ($3\frac{1}{2}$) inches by two (2) inches, and such information may be inserted in public print when not more than one column in width and two (2) inches in depth; or announce his change of place of business, absence from, or return to business in the same manner; or issue appointment cards to his patients, when the information thereon is limited to matter pertaining to the time and place of appointment and that permitted on the professional card; or display the name of the licensee, on the premises where engaged in the profession, upon the windows thereof and by a door plate or name or office directory when the information is limited to that of the professional card. Provided, that the name and title of the registrant shall not be displayed in lettering larger than seven (7) inches. However, nothing in this Act shall prohibit any person licensed to practice dentistry under the provisions of this Act from publicly announcing and informing the public in periods of economic stress and depression that his fee and price for dental services and examination has been reduced to conform with the reduced prices of commodities and services, but no statement of the amount of such fees or prices shall be included."

3. MARYLAND. State Dental Law effective June 1, 1933. Laws 1933, Chapter 564.

The Maryland 1933 Statute prohibits:

"Advertising professional superiority of the performance of professional services in a superior manner. Advertising definite fixed prices where the nature of the professional service to be rendered and the materials required must be variable. Advertising to practice dentistry without causing pain * * * *. The employment or making use of advertising solicitors or of free public press agents * * * *."

4. NEW YORK. Rules effective March 16, 1933. Chapter 609, Laws 1933.

In 1784 there was created a corporation under the name of The Regents of the University of the State of New York. This corporation has been continued and now exists under the name of The University of the State of New York. Its corporate powers are exercised by Nine (9) Regents, subject and in conformity to the Constitution and Laws of the State; and the Regents:

"Exercise legislative functions concerning the educational system of the state, determine its educational policies and, except as to the judicial functions of the commission of education, establish rules for carrying into effect the laws and policies of the state relating to education * * * *."

Section 51 of the Education Law is as follows:

"Subdivision of professions. Conformably to law the Regents may supervise the entrance regulations to

and the licensing under and the practicing of the professions of medicine, dentistry, veterinary medicine, pharmacy, optometry and chiropody, and also supervise the certification of nurses, public accountants, certified shorthand reporters, architects and members of any other profession which may hereafter come under the supervision of the head of the Board of Regents."

Paragraph 2 of Section 2 of Section 1811 of the Education Law specifies certain grounds for revoking and suspending a Dental license. In the exercise of the powers conferred by the Legislature the following, among other rules, are effective in the State of New York.

Rule 2. Advertising professional superiority or the performance of professional services in a superior manner.

Rule 3. Advertising definite fixed prices when nature of the professional service rendered and the materials required must be variable.

Rule 4. Advertising by means of large display, glaring, illuminated or flickering light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head.

Rule 5. Employing or making use of advertising solicitors or free publicity press agents.

Rule 8. The employment of letters, handbills, posters, circulars, cards, stereoptican slides, motion pictures, radio, newspapers or other advertising devices for the purpose of soliciting patronage, except that a dentist may use personal professional cards of a modest type announcing his name, title, address, telephone number and office hours.

The New York Dental Act, as explained in Appendix "A," was formerly part of the public health law, the constitutionality of which was upheld in People v. Griswold, 213 N. Y. 92.

It will be observed that Rule 4 under the New York Statute is, with the exception of minor verbal differences, the same as III-a-8 our outline of the Oregon Statute; and it is interesting to note that Rule 4 under the New York Statute was assailed in Dr. Bloom Dentist, Inc. vs. Cruise, 259 N. Y. 358, and it was held that Rule 4 was valid and enforcible, and the appeal to the Supreme Court of the United States was discussed in an opinion rendered January 23, 1933; and we here set out in full the opinion of the Supreme Court of the United States: (288 U. S. 588).

"January 23, 1933. Per Curiam:

The appeal herein is dismissed, for the want of a substantial Federal question. Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Douglas v. Noble, 261 U. S. 165, 67 L. ed. 590, 43 S. Ct. 303; Missouri ex rel. Hurwitz v. Nohtr, 271 U. S. 40, 93, 70 L. ed. 818, 46 S. Ct. 384; Graves v. Minnesota, 272 U. S. 425, 428, 71 L. ed. 331, 47 S. Ct. 122; Lambert v. Yellowley, 272 U. S. 581, 596, 71 L. ed. 422, 428, 47 S. Ct. 210, 49 A. L. R. 575; People v. Painless Parker Dentist, 85 Colo. 304, 275 Pac. 928, 280 U. S. 566, 74 L. ed. 620, 50 S. Ct. 25; State Dental Examiners v. Miller, 90 Colo. 193, 8 Pac. (2d) 699, 287 U. S. 563, ante 496, 53 S. Ct. 6.

Rehearing denied February 20, 1933."

5. NORTH CAROLINA. Chapter 270, Laws 1933.

Among other things, the 1933 North Carolina Act au-

thorizes the State Board of Dental Examiners to revoke a license if the Licensee

"has by himself, or another, solicited professional business."

6. WISCONSIN. Chapter 189, Laws 1933.

We quote only that portion of the Wisconsin Statute which relates to unprofessional advertising:

"6. 'Unprofessional advertising' as this term is used in subsection (5) shall include:

(a) Any advertising statements of a character tending to deceive or mislead the public;

(b) Advertising professional superiority or the performance of professional services in a superior manner;

(c) Advertising definite, fixed prices when the nature of the professional service rendered and the materials required must be variable;

(d) Advertising by means of large display, glaring, illuminated or flickering light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head;

(e) Employing or making use of advertising solicitors or free publicity press agents;

(f) Advertising either by sign or printed advertisement under the name of a corporation, company, association, parlor or trade name except that legally incorporated dental corporations existing and in operation prior to the effective date of this subsection, may continue so operating, while conforming to the provisions of this chapter. No corporation shall display any sign or advertisement concerning its work by the

use of any name except its true corporate name and the names of the duly licensed dentists practicing in connection therewith. It shall not use any parlor or trade name in connection with such corporate name, or display any sign or advertisement, any parlor, trade or assumed name under which the business was formerly conducted, except its true corporate name."

E. A RECENT CALIFORNIA STATUTE

In Mayer v. State Bar of California (decided October 23, 1933) 26 P. (2d) 9 it was adjudged that Joseph Mayer, a member of the California Bar, was properly suspended because of a violation of Rules 2 and 3 of the rules of professional conduct prescribed under the authority of a 1929 Amendatory Statute. Rule 2 is as follows:

> "A member of the State Bar shall not solicit professional employment by advertisement, or otherwise. This rule shall not apply to the publication or use of ordinary professional cards, or to conventional listings in legal directories."

Rule 3 relates to the employment by an attorney of another to solicit professional employment for him.

F. FACT SITUATION REVEALED BY COMPLAINT DEMONSTRATES NECESSITY OF LEGISLATIVE PROHIBITIONS.

The complaint alleges in substance that plaintiff was admitted to practice Dentistry in Oregon on June 6, 1918; and that since that date he has been engaged in the prac-

tice of Dentistry, with offices in Multnomah County, Oregon.

We call attention particularly to the beginning of Paragraph VII of the Complaint wherein it is alleged: "That during all the time that plaintiff has been engaged in the practice of Dentistry as aforesaid (since June 6, 1918) plaintiff advertised his occupation and his business in the daily newspapers and other periodicals * * * ; and the paragraph continues by alleging the facts which amount to a violation of each and every of the new prohibitions expressed by the Oregon Act of 1933.

We also call particular attention to the beginning of Paragraph VIII of the complaint as follows: "That paintiff has developed and acquired a very high degree of skill and ability in the practice of his profession of Dentistry, in every branch thereof, which is superior to the ability of the great majority of practicing dentists, which superior ability has been acquired by long and extensive training afforded by a very large practice; that by reason of the advertising practices referred to above plaintiff has acquired a very large business, with a very large number of patients." After certain allegations with reference to the number of patients treated and other kindred matters Paragraph VIII concludes with the following allegation: "That by reason of the vast amount of business performed plaintiff has been able to establish a uniform schedule of prices for the great majority of dental operations to be performed."

Paragraph IX concludes with an allegation reading thus: "and that all advertisements utilized by plaintiff, whether in the public press or periodicals, or by means of signs of all kinds have always been and now are absolutely truthful and made in good faith, with the intention of carrying out each and every of the representations contained therein."

Paragraph X avers in part: "That by resorting to advertising of the type and in the manner described above plaintiff has been enabled to build up a very large and lucrative practice with a large number of patients and by reason thereof it has become possible to reduce the price of Dentistry service to the public • • • ."

Paragraph XI is as follows: "That without the practice of advertising in the manner described herein it would have been and is impossible to build up a large practice so as to enable a Dentist to effect the economies in operation that would enable the plaintiff, or any other Dentist, to render a high class of dental service at a very low price so as to make it possible for even the poorest people to obtain proper and adequate dental service."

Paragraph XIII opens with this clause: "That by means of the type of advertising referred to herein plaintiff has built up and established a very lucrative and profitable business with a large following."

The story narrated by the complaint serves as a concrete illustration of the propriety of the legislation enacted by the 1933 Legislature. The plaintiff in effect says in his complaint that he was enabled by advertising to

build up his business to the point of alleged proficiency and to the point of alleged volume and that if he cannot advertise it will be impossible for him to maintain the volume of business now and heretofore done by him. Moreover the inexorable result of the analysis of the complaint reveals that the large volume of business, which the plaintiff secured only by advertising, enabled him to acquire a degree of efficiency which now makes him superior to a great majority of other Dentists. This is only another way of saying that when the plaintiff was admitted to practice he was not a superior Dentist and notwithstanding the fact that he was not a superior Dentist he nevertheless advertised that he was a superior Dentist and by reason of that advertising he has now made true that which was not true in the beginning, for if by a large practice he has developed superior ability then in the beginning before he had this large practice he did not possess that superior ability. The plaintiff has by his own complaint, sworn to by him, indicted and convicted himself of having advertised to the public that he possessed superior ability at the time when, according to his own admissions in his own complaint, he did not possess superior ability. Moreover, the story told by the complaint ends with the conclusion that only advertising in newspapers and pamphlets and the like and by glaring signs, and not by the merit of professional services rendered, can this plaintiff attract the public in large numbers to his offices.

The complaint furnishes a concrete example of the evil which in the wisdom of the Legislature should be removed.

ARGUMENT

An examination of the various statutes to which we have directed attention makes it obvious that it is the consensus of Legislative opinion that restrictions and limitations must be placed upon advertising by members of the Medical, Legal and Dental professions, in order that the standards of those professions may, in the interest of the general welfare, be attained and sustained; and this consensus of Legislative opinion is presumably in response to the demands of public opinion, and likewise, in answer to the demands of the accredited Associations of the respective professions such as National and State and County Medical, Legal and Dental Associations, through which Associations the members speak.

As stated in Mott on "Due Process of Law," Page 567:

> "The State courts have also widely recognized the principles that the Legislature is presumed to be familiar with the local conditions; and those conditions led them to pass the law under question; that the classifications thus made are presumed to be valid; unless it is clearly shown that they are arbitrary and even then they will be sustained if any state of facts can be reasonably supposed to uphold them."

And again, in Mott on Due Process of Law, Page 583, it is said:

> "The Legislature is the best judge of the local conditions and hence their findings of fact must be considered as prima facie evidence."

In People v. Perretta, 253 N. Y. 305, 84 A. L. R. 636, the Court considered a statute requiring persons conducting Milk Gathering Stations to give an approved bond to secure the prompt payment of all amounts due producers, or in lieu thereof to satisfy the licensing authority of their ability to pay probable creditors, and the Court held such a statute to be a reasonable exercise of the Police Power. The Court said:

> "When the legislature takes notice of the dependency of the city on the farm and of the hard and often unremunerative character of farm life we think it may protect the farm from fraud arising from the peculiar conditions under which milk is produced and sold • • • .
>
> That the evil is not imaginary or local is evidenced by the like legislation of other states as follows: • • • " (and here the Court cites statutes from eight states dealing with the same subject matter).

In Radice v. New York, 264 U. S. 292, the Supreme Court of the United States, among other things said:

> "Where the constitutional validity of a statute depends upon the existence of facts, Courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature • • • ."

NATURE AND EXTENT OF POLICE POWER OF THE SEVERAL STATES

6 R. C. L. 188-189.

The Police Power of the several states can perhaps be explained by stating that it is the basic

power of government to make regulations for the protection and promotion of the public welfare. Because of its very purpose, the Police Power is impossible of exact definition and the Courts have repeatedly refused to define it, for to define it is to limit it. The Courts are therefore reluctant to place themselves in the position of limiting this basic right of the state to protect itself in the presence of every changing economic and social condition.

The Courts hold uniformly that the Police Power may always be justifiably exercised to support what is sanctioned by usage, or held by the prevailing morality, or strong and prepondering opinion to be greatly and immediately necessary to the public welfare. All rights and privileges of citizens are subject to such regulations as may be necessary to protect the general welfare.

In the case of *Tanner v. Little*, 240 U. S. 369 (60 L. Ed. 691, 36 S. Ct. Rep. 379; see also, Rose's U. S. Notes), Mr. Justice McKenna, referring to that power, said:

> "We will not here define it or its limitations. As was said by Mr. Justice Brown in Camfield v. United States, 167 U. S. 518, 524 (42 L. Ed. 260, 17 Sup. Ct. Rep. 864, see also Rose's U. S. Notes), citing Rideout v. Know, 148 Mass. 368 (19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81): 'The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case, and the safeguarding of the public interests.'"

In the case of *Noble State Bank v. Haskell*, 219 U. S. 104 (55 L. Ed. 112, 31 Sup. Ct. Rep. 186, Ann. Cas.

192A, 487, 32 L. R. A. (n. s.) 1062), Mr. Justice Holmes, in rendering the opinion of the Court, speaks of the police power in the following language:

> "It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518 (42 L. Ed. 260, 17 Sup. Ct. Rep. 864). It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In *Commonwealth v. Alger,* (1851) 7 Cush. (Mass.) 53, Mr. Chief Justice Shaw of the Massachusetts Court gave a definition of the term "police power" that is frequently cited and quoted with approval by the courts. Among other things, the Justice wrote:

> "All property in this commonwealth is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and such reasonable restraints, and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without,

not repugnant to the Constitution as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and the sources of this power than to make its boundaries or prescribe the limits of its exercise."

In *"Public Health Law,"* Tobey, at page 223, appears the following interesting and concise statement concerning the fundamental legal principles applicable to public health procedure, and its relation to the police power of the municipality:

"The administration of public health activities in the United States is primarily vested in the individual states. This is so because the protection of health is a part of the police power, that inherent power of a government to enact laws, within constitutional limitations, to promote the health, safety, morals, order, comfort and general welfare of the people. The police power may be employed for the benefit of the people as a whole, to restrain the use of liberty and the property of individuals, for it is founded on the maxim, 'the greatest good to the greatest number.' The states possessed this police power before the Federal Constitution was established in 1789, and they did not relinquish the right at that time, nor have they done so since. They cannot, in fact, divest themselves of the police power.

The police power is a law of necessity, and its extent "must from time to time conform to the growth of our social, industrial, and commercial life. You cannot put a straight-jacket on justice any more than you can put a straight-jacket on business."

THE APPLICATION OF POLICE POWER TO PARTICULAR CLASSES OF PERSONS

State ex rel. Davis Smith Co. v. Clausen, 65 Wash. 156.

Fitch v. Applegate, 24 Wash. 25.

Packer Corporation v. State of Utah, 285 U. S. 105, 79 A. L. R. 547.

Laughney v. Maybury, 145 Wash. 146, 54 A. L. R. 393.

Rust v. State Board of Dental Examiners, — Wis. — 256 N. W. 919.

Modern System Dentists v. State Board Examiners, — Wis. — 256 N. W. 922.

Owen, J. E., In re Accusation vs. N. Car. Sup. Ct. Dec. 12, 1934 (Schenck, J.) (Not officially reported yet).

It is well settled that in the exercise of the Police Power the State Legislature may enact legislation affecting particular classes of persons. The sole requirement for the validity of such legislation is that the classification of persons be reasonable and that all persons similarly situated be similarly affected.

THE APPLICATION OF POLICE POWER TO THE LEARNED PROFESSIONS

The need for control by society over the conduct of professional men in their relation to the people has been recognized since antiquity. The necessity for this regula-

tion arises from the intimate relationship of attorneys, physicians and dentists and other professional men to the health and welfare of the people.

This recognized need has been met in several ways. Sometimes the conduct of professional men has been prescribed in religious codes and at other times the control has been by means of the general customs of an entire community, and at other times by regulations embodied in codes of particular craft or professional groups. The final type of control over the conduct of professional men is through regulation by law, exercising the sovereign power of the State.

The trend in modern states has been to resort in increasing degree to statutory enactments embodied in the professional practice acts and the general laws through the exercise of Police Power. This trend is due in large part to the infiltration into the professions, particularly the practice of law, medicine and dentistry of the "high pressure" methods of obtaining practice which have been developed in some sections of the business world. Due to these influences the learned professions have threatened to degenerate into a predatory business. In this situation mere self-enforcing principles of professional conduct are ineffectual because every profession contains a certain number of individuals who are scornful of self-enforcing standards of professional conduct and who in the absence of legal regulations backed with the support of the Police Power of the State do serious injury to the welfare of the people.

REGULATION THROUGH USE OF THE POLICE POWER ESPECIALLY NEEDFUL IN CONTROLLING PRACTICE OF HEALING ART.

Hawker v. New York, 170 U. S. 192.

Dent v. West Virginia, 129 U. S. 114.

State v. Randolph, 23 Or. 74, 31 Pac. 201, 17 L. R. A. 470.

The profession of healing, on account of the intimacy and importance of its contact with the people, and its effect upon the public welfare, has long been the object of regulation under the Police Power. This regulation has been very broad in scope with the objective of protecting the public against incompetent and unscrupulous practitioners: first, by establishing and enforcing proper standards of training and moral character upon which the licensure or entrance to the profession is made to depend, and secondly, by establishing and enforcing suitable rules to govern the licensee's subsequent professional conduct.

Legislative regulations applying the Police Power to the profession of treating the sick would probably be unnecessary if every person could accurately determine for himself the physician's and dentist's ability and character, because, no person being willing to submit the care of his body to ignorant, immoral or unscrupulous healers, they could not thrive. But the layman's unaided estimate of a physician or dentist is more likely to be wrong than right. An ignorant or fraudulent quack, without conscience, with

no object but plundering the sick by untruthful or misleading advertisements of self-praise in newspapers or through the radio often in large cities obtains in a few days a more numerous clientele than a learned and upright physician or dentist has been able to attract in a lifetime.

Determining the competence of a physician or dentist to minister to the sick or disabled involves appraisement of matters of science with which most persons are unfamiliar. Determination of the moral character of a physician or dentist is a task in which persons of the widest experience with men are not so sure of their judgment as to refuse the assistance of those who have made an actual investigation and ascertained the facts concerning the particular man.

In the case of *Hawker v. New York,* 170 U. S. 192, the Court, speaking through Mr. Justice Brewer, said:

> "No precise limits have been placed on the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of

good character shall be furnished. These propositions have been often affirmed."

What is regarded as the classic expression of the theory surrounding the exercise of police power for the regulation of the profession of healing is found in *Dent. v. West Virginia,* 129 U. S. 114, in which Mr. Justice Field said:

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition * * *.

"But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with the conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be

raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the proprieties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected * * *. We perceive nothing in the statute (under consideration) which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the com-

munity his service as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications."

APPLICATION OF POLICE POWER IN REGULATING PROFESSIONAL CONDUCT WHICH MAY RESULT IN DECEPTION OF THE PUBLIC.

State Medical Board v. McCrary, 95 Ark. 511, 22 Ann. Cases 631.

State Medical Board v. Macey, 96 Wash. 614.

People v. Apfelbaum, 251 Ill. 18.

As has been previously suggested the Police Power is properly applied to protect the public against incompetent and unscrupulous physicians and dentists by establishing and enforcing suitable rules to govern the licensee's professional conduct as well as by establishing proper standards for entrance to these learned professions. This regulation of subsequent professional conduct is especially directed at the methods used by physicians and dentists to obtain patients to the end that the sick and afflicted be not deceived.

It is well established by authority, both legislative and judicial, that physicians, dentists and attorneys may not resort to fraudulent or deceitful practices in their relations with patients or clients.

The prohibitions placed on the conduct of the professional man govern his actions while he is serving his client or patient and also the methods by which he obtains patronage.

This type of legislation is illustrated by professional practice acts prohibiting practice under a name other than the licensee's true name and advertising ability to treat or cure chronic or incurable diseases.

POLICE POWER NOT LIMITED TO PROHIBITING PALPABLE FRAUDS AND DECEITS.

Coach v. Gage, 70 Or. 183, 138 Pac. 147.

People v. Girard, 145 N. Y. 105, 45 A. S. R. 595.

Freund, "Police Power," Section 275.

Tiedeman, "The Limitations of the Police Power," Section 89, Page 207.

People v. Wagner, 87 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 A. S. R. 141.

Squire v. Tellier, 185 Mass. 18, 69 N. E. 312, 102 A. S. A. 323.

Lemieux v. Young, 211 U. S. 489.

Exercise of the Police Power is not limited to acts which are *malum in se*. It is apparent that such narrow interpretation of the Police Power would almost nullify the fundamental object of this basic power of government under which the State Legis-

lature acts in the general interests of the health and welfare of the people. If such a supposed contention were sound, the public could never be adequately protected against the evil effects of that large category of acts which, while otherwise harmless, may under certain special conditions result in grave injury to the public health and welfare. Many cases may be cited to show that the true legal principle to be followed is that any practice which results in harm to the public welfare is properly subject to regulation through the Police Power free from constitutional objections.

Mr. Justice Brandeis in a dissenting opinion rendered in Adams vs. Tanner, 244 U. S. 599, stated:

> "Where there was no question of interstate commerce involved, the U. S. Court has sustained statutes or municipal ordinances which compelled discontinuance of such business as (a) of manufacturing and selling oleomargarine, Powell v. Pennsylvania, 127 U. S. 678, (b) of selling cigarettes, Austin v. Tennessee, 179 U. S. 343, (c) of selling futures in grain or other commodities, Booth vs. Illinois, 184 U. S. 425, (d) of selling stocks in margin, Otis v. Parker, 187 U. S. 606, (e) of keeping billiard halls, Murphy v. California, 225 U. S. 623, (f) of selling trade stamps, Post v. Van Deman & Lewis Co, 240 U. S. 342, 368.
>
> These cases show that the scope of the police power is not limited to regulation as distinguished from prohibition. *They also show that the power of the State exists equally, whether the end sought to be attained is the promotion of health, safety or morals or is the prevention of fraud or the prevention of general demoralization.* If the State thinks that an admitted evil cannot be prevented except by prohibiting a call-

ing or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law,' Otis v. Parker, 187 U. S. 606, 609; Booth v. Ilinois, 184 U. S. 425, 429. Or as it is so frequently expressed, the action of the legislature is final, unless the measure adopted appears clearly to be arbitrary or unreasonable or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not determined by assumptions or by a priori reasoning." (italics ours.)

It is evident that the power of the State Legislature to prohibit advertising is not limited to restraining advertising which is palpably fraudulent and deceitful or advertising in which the physician, dentist or attorney has the intent to defraud or deceive. The Courts have frequently held that advertising which tends to mislead or may mislead the public may properly be prohibited. It has also been held that the State may in the public interest prohibit acts which are otherwise harmless in themselves, but which, if not prevented, offer special opportunity to deceive and defraud. Even more striking an illustration of the scope of the Police Power in prohibiting acts of this character is seen in the decisions which upheld the validity of prohibitions against advertising which results in creating false impressions in the minds of a substantial number of the consuming public, irrespective of the intent of the advertiser or the content or form of the advertisement.

One case, which clearly illustrates the soundness of Appellee's contention that police power is not limited only to prohibiting acts which are *malum in se* is the case of *Coach v. Gage*, 70 Ore. 183. This case involved the constitutionality of the Bulk Sales Law. The court stated on page 188:

> "*Now the purchase of a stock of goods in bulk is in itself an innocent act;* but, for the reason that persons carrying on the business of dealing in merchandise more frequently than otherwise purchase a part of their stock on credit and often from dealers residing at a distance, and because it has become a matter of common knowledge that transfers of stocks of goods in bulk with intent to defraud creditors are a frequent form of swindling, the legislatures of a majority of the states, in the exercise of their police powers, have enacted laws to safeguard such transfers."

In *People v. Girard*, 145 N. Y. 105, 45 A. S. R. 595, the Court held similarly on this question on entirely different subject-matter. In this case, the Court held that a statute prohibiting every person from manufacturing or keeping for sale any vinegar containing any artificial coloring matter was constitutional and enforceable though the coloring was harmless and not injurious to health, and the vinegar so colored was in all respects equal to the best vinegar of the class which it was colored to represent, if the object of the coloring was to deceive purchasers into believing that the vinegar was of this latter class.

Authorities are legion in support of the proposition that acts otherwise harmless are properly subject to regu-

lation through the police power when such acts under particular circumstances result in the misapprehension of the public to their harm and injury.

Freund, the outstanding American authority on the police power, writes succinctly and aptly on this subject in Sec. 275 of his classic treatise, "The Police Power." This authority writes as follows:

> "The private and the criminal laws, as well as the police power, undertake to offer protection against fraud. They deal, however, with fraudulent practices only by remedial relief, treating a transaction as void or setting it aside, giving a claim for damages or inflicting a penalty after that fraud has been committed. In either case, the element of fraudulent intent is essential *The police power undertakes to give an ampler protection, both by adopting precautionary measures and by forbidding certain practices irrespective of an actual intent to defraud.* It does not in the first instance punish fraud, but it prescribes regulations and punishes their violation. The interference of law proceeds on the theory that everyone who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension. When the confidence of the public is invited to an exceptional degree, the regulations may be made especially stringent, on the ground that the business is affected with the public interest." *(Italics ours.)*

Tiedman, another recognized authority on the police power, in his book, "The Limitations of the Police Power," Sec. 89, Page 207, supports this view with similar emphasis in the following language:

"A fraud is, of course, a trespass upon another's private rights, and can always be punished when committed. *It is, therefore, but rational to suppose that the State may institute every reasonable preventive remedy when the frequency of the frauds or the difficulty experienced in circumventing them is so great that no other means will prove efficacious.* Where, therefore, police regulations are established which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, the laws are free from all constitutional objections." *(Italics ours.)*

EVIL PRACTICES PREVALENT IN THE FIELD OF RETAIL COMMERCE

In recent years numerous evil practices have crept into the sales aspects of retail commerce. One group of such injurious practices which are perhaps the most vicious from a social point of view are those methods of attaining business which have come to be known and condemned as "bait advertising." The common characteristic of this group of practices is the lure offered to the consuming public by various statements which while not fraudulent per se are nevertheless used for the single purpose and with the undoubted effect of misleading the buying public. This so-called "bait advertising" consists largely not of outright untruths but the use of half-truths in describing the products or services offered and the inferential disparagement of the goods, services, and prices of competing merchants through exaggerated claims of superiority for the products or services of the advertiser. These practices are now gen-

erally recognized as markedly injurious to the consuming public who are thus entrapped into the purchase of products of quality inferior to that anticipated, as well as to large classes of our citizens whose standards of conducting business will not permit the use of such practices. The evil results of such "bait advertising" and similar disparaging trade practices have in many cases led to undermining the confidence of the public in an entire industry.

PRESENT TREND TO REGULATE BUSINESS PRACTICES IN THE PUBLIC INTEREST

Reference has recently been made to the self-enforcing regulations developed by craft and professional groups to control the conduct of professional men to the end that the public be protected against injurious practices by physicians, dentists, attorneys, and other professional men who serve the people in matters intimately related to the public health and welfare. The beneficial results of this regulation, which have been supplanted in large part by statutory regulation, coupled with a developing public approval of such voluntary and statutory regulation, has resulted in recent times in the adoption and enforcement of similar self-enforcing codes of business practice by trade and commercial associations.

The results of this trend are apparent in the federal statute creating the Federal Trade Commission which has been granted broad powers to determine and enforce regulations governing trade and business practices in the

interests of the public welfare. The activities of this commission are largely directed at regulating advertising by preventing the use of unfair methods of obtaining business, the ultimate result of which is injury to the general public.

INFILTRATION OF HARMFUL PRACTICES OF PREDATORY BUSINESS INTO THE LEARNED PROFESSIONS.

The pernicious practices previously referred to and now generally recognized as socially injurious, when used in the business, would have become widely prevalent in the professional field, particularly in the practice of dentistry. State dental boards throughout the country in recent years have been besieged with complaints from people who have been misled by the widespread and blatant advertising of the self-laudatory and "come to me" species. These people have been lured by the "bait" advertising consisting of exaggerated claims of professional superiority, superior quality, painlessness, and other misleading statements presented by a few dentists through the various advertising media, particularly the newspapers and via the radio.

The practice of employing so-called "cappers," "steerers," and "runners," by attorneys, physicians and dentists as a means of inducing the patronage of clients and patients has long been prohibited in almost all states by specific prohibitions in the professional practice acts under penalty of disbarment or revocation of license. These

prohibitions, however, which relate to solicitation of practice through lay persons are not efficacious in preventing similar solicitation through impersonal instrumentalities, the use of which has largely replaced the old evil of the "capper," "steerer," and "runner." The more recent practice developed by imitation of certain types of predatory business has been largely through the use of impersonal agencies, including displays, signs and newspaper and radio advertising, coupled with the employment of advertising solicitors and free publicity press agents have also seriously affected conditions in the practice of the learned professions. There has been a serious infiltration of these practices into the professions, particularly into the practice of law, medicine, and dentistry. Under the pressure of this infiltration the practice of the learned professions has threatened to cease to rest upon a well-merited reputation for the ability and integrity with which the lawyer physician and the dentist render these intimate and personal services to the sick and perplexed. In short, the learned professions have threatened not only to degenerate into a business but a "predatory" business.

INJURIOUS PRACTICES PREVALENT IN THE PROFESSION OF DENTISTRY SOUGHT TO BE CORRECTED BY THE STATE LEGISLATURE BY THE ACT IN ISSUE.

The increasing use by a small minority of professional men of the "high-pressure" methods developed by certain

types of predatory business has seriously concerned the state boards charged with the duty of protecting the public against unskilled and unscrupulous practitioners, particularly in the professions of law, medicine, and dentistry. State dental boards throughout the country have been shocked as a result of multitudinous complaints received from patients. Along with the use of these instrumentalities a small number of dentists have also adopted other methods used by certain predatory classes of retail merchants in inducing patronage by means of exaggerated claims of "professional superiority," "painless dentistry," "free" dental work, "free" examinations, "guaranteed" dental work, and similar statements which are either half-truths or may result in the perpetuation of fraud.

PREVALENT EVILS IN THE PROFESSION OF DENTISTRY AS ILLUSTRATED BY ADVERTISING SO-CALLED "PAINLESS" AND "GUARANTEED" DENTISTRY.

The deceptive character of certain types of advertising is well illustrated by a brief consideration of two common forms of "bait" advertising used by a small number of dentists.

It is well known to those who are familiar with the extraction and restoration of teeth that so-called "painless" dentistry is a delusion and a snare. The advertising of "painless" dental work is perhaps the most flagrant of the many falsities employed to entice the public. It is true

that there are several generally accepted means of inducing anesthesia and thus reducing and minimizing pain accompanying the various procedures in dental surgery. However, the administration of all anesthetics in dentistry is accompanied by considerable discomfiture or pain and pain is almost invariably present after the anesthetizing agent has lost its numbing effects.

It is well-established that no professional man can "guarantee" his work or promise his client that the outcome of his case whether it be legal, medical, or dental will terminate successfully for the client. It is certain that no patient of a physician or surgeon who has been treated for a bodily disease or lesion of the teeth or mouth can be restored to his original physical condition following a wrongful diagnosis or treatment.

THE IMPOTENCE OF THE STATE BOARD OF DENTAL EXAMINERS UNDER THE OLD STATUTE.

Under the provisions of the previously existing dental practice act, enacted 20 years ago by the 1913 state legislature, the State Board of Dental Examiners, like many other state dental boards, were powerless to discharge their duties as state officials in the prevention of these pernicious practices. This impotence was due to the fact that the prohibition in the statute against the employment of "capers" and "steerers" did not extend to the use of impersonal agencies of solicitation and to the vague and

general restriction upon advertising which merely provided for the following prohibition:

> "The advertisement of dental business or treatment or devices in which untruthful and misleading, improbable or impossible statements are made."

Faced with this situation, the Board sought to ascertain a means of protecting the people against these evil practices. The Board therefore made a thorough study of the existing dental practice act and the practice acts of other states, together with an examination of legislation recently enacted or under consideration in the several states to remedy these evils. As a result of the Board's study, the bill for the act under discussion was prepared and submitted to the 1933 State Legislature.

RECOGNITION BY THE STATE LEGISLATURE OF THE PUBLIC DEMAND FOR THE CURBING OF EVIL ADVERTISING PRACTICES PREVALENT IN THE PROFESSION OF DENTISTRY.

That the State Legislature was convinced of the need of remedial legislation prohibiting certain types of advertising by dentists embodied in the act in issue and was conscious of the impelling public demand for the same is clearly evident from the history of the bill in the legislature. The bill was given practically unanimous support by the dental profession of the state and even by a

large majority of the so-called advertising dentists. The bill was passed almost unanimously by both houses of the legislature, with but four negative votes out of 60 in the lower house and without a single negative vote in the senate which numbers 30 members.

Significant also of the insistent public demand for protection against pernicious practice prevalent in both the professional and business fields, was the passage by the 1933 State Legislature by large majorities of the so-called Fake Sales Act and the Fair Trade Act. These latter acts, like the act in issue, are designed to curb certain practices resulting in injury to the public welfare, except that these two acts aim to eliminate some of the evil practices which have been prevalent in the field of retail commerce.

WEIGHT OF AUTHORITY

Appellees can add but little to the words of the court in *Thompson* v. *Van Lear*, 77 Ark. 306 wherein the court arrived at the legislative intent behind a statute which prohibited physicians using drummers to secure business for them. The court there said (p. 513-515):

> "Counsel for plaintiff quote Oliver Wendell Holmes as saying that 'if the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind, and all the worse for the fishes.' We do not dispute that statement for there may be some truth in it, it is possible that the legislature had something of the kind in mind when it passed this act. It may have thought that people are too much in-

clined to imagine themselves in ill health, too prone to consult doctors, and take medicine anyway, without being urged to do so by hired agents. If it is true, as the 'eminent medical authority' quoted by the counsel says, 'that out of twenty-four serious cases of disease three could not be cured by the best remedies, three might be benefited, and the rest would get well anyway'—if this be true, is it not better, as a rule, to 'throw physic to the dogs,' and let nature take her course? Now, it is probable that the conscientious physician would give that advice to his patient in a case where he needed no medicine. But it is not likely that a physician would hire an agent to drum up patients for him only to say to them: 'Go thy way; thou dost not need a physician.' A physician who has secured a patient by means of a hired agent has paid out a certain sum to obtain his patient, and is under a strong temptation to put him through a course of treatment, whether he needs it or not, in order to get his money back and make a profit on his investment.

When a physician obtains patients in that way, he, in effect, buys them, just as if he said to the agent, 'I will pay you a certain fee out of the money I receive from each patient you send me.' Now, we do not think prudent people would risk to submit to the advice of a physician who had paid out money to get them under his treatment. To be successful, the agent would necessarily have to keep his interest in the transaction secret from the patient, and it can be easily seen that such a method of securing patients would very often result in imposition and fraud on the patient and in inducing many people to take treatment who did not need it.

"As we have stated, even persons of good health are often prone to imagine themselves in need of medicine. If it is unsafe to allow such persons to be solicited by hired agents, to take what they do not need, how much worse it is to expose the sick to such influences! A man or woman who is laboring under a bod-

ily disease is, other things being equal, more easily imposed upon than one who possesses a sound mind in a sound body. The mind of the sick man, like his body, is in an abnormal condition. He is inclined to grasp at shadows and to pursue the wind, and is easily misled into paying money for medical treatment that he does not need. The man who is induced by an agent to buy goods of a merchant can see the goods and judge of their quality before paying his money. But the sick man must take the treatment for which he pays as a matter of faith. As to whether he will be benefited or not, he can only conjecture. He can only judge of the value of the treatment to which he submits by its subsequent results, and not even then with any great degree of accuracy, for the cause which lead to health or disease are often obscure. They elude even the trained mind of the physician, and much more easily that of the patient.

"The objections which we have stated to this method of securing patients, the temptations to which it would subject the physician, and the danger to which it would expose the patient, show a wide distinction between the case of a merchant who drums for custom by hired agents and that of a physician who seeks patronage in the same way. The business of the physician directly affects the public health, and it does not follow, because the merchant, the manufacturer and others may do the same thing through hired agents, that a physician may do the same thing. The legislature has forbidden the physician to do so, and there are, in our opinion, sound reasons upon which to base the distinction. The law thus undertakes to protect the physician from the temptation and the patients from the danger to which they would be exposed by such a practice. When we consider how easy it would be in many cases for the professional drummer to impose upon sick people, and even upon those who are well, and induce them to submit to treatment they do not need; when we consider that a physician who had

paid for a patient would be under a strong temptation to make a profit out of his investment, and to give and charge for treatment they do not need; when we consider that a physician who had paid for a patient would be under a strong temptation to make a profit out of his investment, and to give and charge for treatment whether the patient need it or not; when we consider the fraud and imposition that would be encouraged by such a method of securing patients—we easily reach the conclusion that the law wisely prohibits a physician from seeking patronage by means of paid agents."

Several years later in the state of Arkansas there was submitted to the Supreme Court in that State the question of the validity of a statute which prescribed that the State Board might revoke a physician or surgeon's license for "publicly advertising special ability to treat or cure chronic and incurable diseases."

It should be noted in this connection that while it would be obviously fraudulent for a physician or surgeon to advertise that he could cure diseases that were chronic and incurable that this statute did not limit itself to this alone but also forbade "publicly advertising special ability to treat." It is obvious that many physicians might have special ability to treat certain incurable diseases. Since this could frequently be made the instrumentality of fraud, the Court said:

"In the case of Thompson v. Van Lear . . . this Court held that an act forbidding physicians and surgeons to solicit patients by paid agents was a valid exercise of the police power. For like reason, a statute forbidding a physician to advertise for patients in newspapers would be upheld; and, by analogy, a stat-

ute forbidding them to advertise their ability to treat and cure certain named diseases would be a valid exercise of the police power." State Medical Board v. McCrary (1910), 95 Ark. 511, 131 S. W. 544, Ann. Cas (1912A) 631.

It is apparently seriously contended by the Appellant in the instant case that certain types of advertising are forbidden, whereas other types of advertising, such as word-of-mouth advertising in a dentist's office, is permitted. However, it is generally recognized that the legislature may recognize degrees of evil and adopt its legislation accordingly.

In the case of Packer Corp v. State of Utah, 285 U. S. 105, 79 A. L. R. 547, the Supreme Court of the United States was concerned with a statute which forbade any person, company or corporation from displaying on billboards, street car signs, street cars, placards or on any other object or place of display any advertisement of cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars, or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing therein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah.

It was contended in that case that the Federal Constitution was violated in that the statute permitted discrimination between display by other means, such as advertisements in newspapers, magazines and periodicals. Justice Brandeis, speaking for the Court, adopted the language of the State Supreme Court of Utah, and said in part: "Advertisements of this sort are conspicuously before the eyes of the observers on the streets and in street cars, to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have those of the billboard thrust upon them by all *the arts and devices that skill can produce*. In the case of newspapers or magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. This distinction clearly places this kind of advertisement in a position to be classified, so that regulation or prohibition may be imposed upon all within the same class. This is important with respect to newspaper and magazines."

The doctrine of the Thompson v. Van Lear case and the State Medical Board v. McCrary, already alluded to, have been applied equally well to a Washington Statute forbidding all advertising save that by a professional business card.

In the case of *Laughney vs. Maybury*, 145 Wash. 146; 259 Pac. 17; 54 A. L. R., 898 (1927) the Supreme Court was concerned with the constitutionality of a statute that went much further than the Oregon statute now under

consideration. The Washington statute prohibited all advertising. The only advertising permitted there was the use of a professional business card. The statute which the Washington Supreme Court had before it, consequently, went much further than the Oregon Statute as our state legislautre did not prohibit dental advertising but simply undertook to regulate it. Dentists will still be permitted to advertise in Oregon. However, the character of the advertising is subject to certain regulations. We respectfully submit that the case of Laughney vs. Maybury represents the weight of authority as shown by the very exhaustive and illuminating note which appears appended to this case in 54 A. L. R. 393.

Since the Supreme Court of the State of Oregon has upheld the law regulating Dental Advertising, the question of the constitutionality of similar statutes have been considered by the Wisconsin Supreme Court. The Wisconsin Supreme Court in the case of Modern System Dentist v. State Board of Dental Examiners, 256 N. W. 922, and in the case of Rust v. State Board of Dental Examiners, 256 N. W. 919, the validity of legislation similar to the Oregon Act was sustained. In the Rust case the Supreme Court states:

> "The power of the legislature of a state to enact laws similar to Chap. 152 has been considered in a number of jurisdictions, the most recent case being that of Semler v. Oregon State Board of Dental Examiners, 34 Pac. (2d) 311, citing with approval Laughney v. Maybury, 145 Wash. 146, s. c. 54 A. L. R. 393, to which is appended a note, Constitutionality of statute or ordinance prohibiting or regulating advertising by physician,

surgeon, or other person professing healing arts, in which the cases are classified and collected.

"We have no difficulty under the announced decisions of this Court in reaching the conclusion that Chap. 152 is a valid statute well within the constitutional power of the legislature. State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472 (N. W.). We approve and adopt the reasoning of the Oregon Court in the Semler case and no useful purpose would be served by a reconsideration of the cases there referred to. See also in the Matter of Dr. Bloom Dentist Inc. v. Cruise, 239 N. Y. 358."

It must be borne in mind that the professions are what might be classified as stabilized trades. They are not ephemeral, fly-by-night occupations. It is only recently that there has been a marked attempt on the part of a racketeering minority to inject the characteristics of a fly-by-night business.

Professional men formerly gained their business by patient and painstaking years of diligent application to the best interests of their clients or patients. Should this law be declared unconstitutional the professions might well be on their way to decay. The courts have recognized that the same kind of commercialism which has crept into the dental profession has also been creeping into other professions such as the law.

In Heep v. Petrie, 185 Wis. 350, at page 358, the Supreme Court speaking through its Chief Justice wrote:

"There are not wanting signs that the taint of commercialism which has reached other professions has

likewise laid its blighting hand upon the profession of the law. In a time when the emphasis in our national life is upon production and distribution, it is perhaps not strange that men should enter the legal profession who regard it merely as a trade or means of livelihood or of accumulating a fortune. It is not necessary to descant upon the glories of the legal profession, but any lawyer who has no other ideal than that of making money in the practice of his profession is almost certain to go wrong."

We respectfully submit that Law is not the only profession which should be protected again the incursions of fakirs and quacks who undermine the public support of the professions. It is difficult to assume that the courts should hold themselves and their agents upon such a high level and at the same time hold that no other profession can come up to the standards of the legal profession. We feel confident that the Supreme Court of this state will not permit this to occur.

PRESENT STATUS OF CASES RELIED ON BY APPELLANT

Appellant, in assembling his authorities, relies upon five cases:

Ohio; Ex parte Craycroft, 24 Ohio N. P. (N. S.) 513; Texas: Waller v. State, 68 S. W. (2d) 601, decided Jan. 28, 1934; Colorado: Chenoweth v. State Board of Medical Examiners, 57 Colo. 74; Illinois: Kalman v. Walsh, 355 Ill. 341-347; Schierson v. Walsh, 354 Ill. 40, 187 N. E. 921.

The two Illinois cases, Kalman v. Walsh and Schierson v. Walsh, cited by appellant herein have no application to the case at bar.

The Schierson case deals with the delegation of legislative authority to an administrative tribunal, and the Kalman case concerned itself with what constitutes proper notice to a licensed dentist who has been hailed by an administrative board on revocation proceedings.

Waller v. State, 68 S. W. (2d) 601, is a decision rendered by an intermediate appellate court and not one of last resort in Texas. The Court did not pass upon the constitutionality of the statute. Neither did the Court in the Waller case have submitted to it the authorities that have upheld dental advertising in this country. The attention of the Court was not directed, for instance, to Laughney v. Maybury, supra, then probably the leading case on this subject. The Court in the Waller case stated in its opinion, "We have found no case in or out of Texas upholding any such statute and would feel certain it would be unsound, if we did," etc.

In ex parte Craycroft, 24 Ohio, N. P. (N. S.) 513, appellant again relies upon a decision of an inferior court. In the Craycroft case the Court had before it the question of the constitutionality of a statute which permitted the revocation of a dentist's license for advertising "with a view of deceiving the public," etc. That statute was declared unconstitutional by this Court of inferior jurisdiction because it was held to be vague and indefinite and

because it was regarded as class legislation. However, the question of vagueness or indefiniteness is not at issue in the case at bar.

Then again, the decision that that statute constituted class legislation is entitled to little weight in view of the fact that that decision was not appealed. Had it been appealed it is submitted that it is extremely unlikely that the Supreme Court of Ohio would have held that the statute there in question constituted class legislation, in view of the other decisions cited in this brief which hold that a statute applying equally to all of the members of a profession, such as dentists, is not class legislation.

Appellant relies largely on Chenoweth v. State Board of Medical Examiners, 57 Colo. 74 (141 Pac. 132), which holds unconstitutional the statute authorizing the revocation of a licen[illegible]on the ground, among others, of "causing the publication or circulation of an advertisement relative to any disease of the sexual organs." This opinion, by a divided Court, has been greatly weakened by the latter cases of People v. Painless Parker Dentists, 85 Colo. 304 (275 Pac. 928), and Sapero v. State Board of Examiners (Colo.), 11 Pac. (2nd) 553.

The Supreme Court of Colorado in these two subsequent cases has used language to lead one to believe that if the case were again presented to the Court that it would overrule itself. The following language in People v. Painless Parker Dentist (1929), 275 Pac. 928, 85 Colo. 304, is significant (p. 930-1):

"In the Chenoweth case it was held that our General Assembly may enact reasonable regulations, of which the courts may judge, for the examination of those who would practice medicine. And it was held in that case that a regulation of the General Assembly authorizing a revocation of a physician's license for publishing an advertisement relating to diseases of the sexual organs was void for uncertainty and in violation of the Fourteenth Amendment to the Federal Constitution and of our own Bill of Rights. There may be expressions in the majority opinion that give color to some things contained in the defendant's brief here; *but that decision—and we are not to be understood as approving of it*—is not authority for the defendant's contention here." (Italics ours.)

In a still later case, Sapero v. State Board of Examiners, 11 Pac. (2d) 555, the same Court said, page 557:

"As a side light on the present Medical Act, interesting history was made in Chenoweth v. State Board of Medical Examiners, 57 Colo. 74, 141 Pac. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915D, 1188, decided at the January term, 1914. We there pointed out at page 81 of 57 Colo., 141 Pac. 132, that the then existing statute did not make unprofessional or dishonorable conduct a ground of revocation of a physician's license. The 1915 (Laws 1915, page 420) General Assembly, apparently mindful of this suggestion, remedied defects in previous acts, among other things by adding the words 'immoral, unprofessional or dishonorable conduct.' The same words were repeated in another amendment (Laws 1917, p. 359, Sec. 11) identical with Section 4536. We do not regard the words quoted as indefinite or uncertain; they have been repeatedly considered by the legislature with care, and the same or similar words have been often made the basis of complaints or informations for the revocation

of professional licenses in this state and other jurisdictions."

Clearly, then, that Court would now uphold that provision which in the Chenoweth case was held bad.

The Washington Court had the Chenoweth case to consider in Laughney v. Maybury, 259 Pac. 17, 145 Wash. 146, 54 A. L. R. 393. That Court had this to say about that case:

"By a divided court the Supreme Court of Colorado in the case of Chenoweth v. State Board of Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915D, 1188, held a statute against causing the publication and circulation of an advertisement relative to any disease of a specified part of the body to be invalid and violative of constitutional rights. That case is relied on by the appellant, and we think, as stated by the respondents, that if it is to be followed the judgment in the present case must be reversed. But, with all due respect to the majority opinion in that case, we decline to follow it. It contains arguments more nearly approaching the kind ordinarily used by that school of thought who would commercialize a splendid profession in their addresses to a legislature, having under consideration the enactment of a law containing regulatory measures than the kind appropriate to a court when called upon to declare a solemn act of the legislature to be unconstitutional. The question decided in the Colorado case was decided the other way in Kennedy v. State Board of Registration of Medicine, 145 Mich. 241, 108 N. W. 730, 9 Ann. Cas. 125, and State v. Hollinshead, 77 Ore. 473, 151 Pac. 710, as was done in the Arkansas case (Thompson v. Van Lear, 77 Ark. 506) and we prefer to follow these cases."

See, also, In re Cohen, 261 Mass. 484, 159 N. E. 495, 55 O. L. R. 1309.

POINTS AND AUTHORITIES

1.

The legislature has a broad discretion in making classifications for police regulation.

A licensing statute does not grant special privileges contrary to a constitutional inhibition, because licensees thereunder enjoy privileges denied others not licensed.

Barrett v. Indiana, 229 U. S. 26, 29.

Halter v. Nebraska, 205 U. S. 34.

Murphy v. California, 225 U. S. 623.

People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A. L. R. 605, 615.

2.

The State has power to legislate with respect to persons in certain situations.

Packer Corporation v. Utah, 285 U. S. 105, 79 A. L. R. 546.

3.

In the exercise of its police power the State need not cover the whole field of possible abuses.

3 Honnold on Supreme Court Law, p. 1907.

State v. Broden, 181 Minn. 341, 232 N. W. 517.

4.

The State has the power of dealing with each profession as a class unto itself and in doing so does not violate the equal protection clause of the Constitution.

State v. Randolph, 23 Or. 74, 31 Pac. 201, 17 L. R. A. 470.

Peet Stock Remedy Co. v. McMullen, 32 Fed. (2d) 669.

Erdman v. Great Northern Life Insurance Co., 253 Mich. 579, 235 N. W. 260.

State v. Smith, 127 Or. 680, 684, 273 Pac. 343.

State v. Burroughs, 130 Or. 480, 486, 280 Pac. 653.

Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 70 L. Ed. 818, affirming 304 Mo. 607; 264 S. W. 678.

5.

Legislation which affects all persons pursuing the same business under substantially the same conditions is not such class legislation as is prohibited by the Constitution.

Churchill v. Albany, 65 Or. 442, 446, 133 Pac. 632, 35 Ann. Cas. 1194.

State v. Catholic, 75 Or. 367, 373.

State v. Putney, 110 Or. 634, 644, 224 Pac. 279.

6.

The state legislature may regulate degrees of evil and adjust legislation to existing conditions without covering the whole field of possible abuses.

1 Honnold Supreme Court Law, page 304.

Graves v. Minnesota, 272 U. S. 425.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 80-81, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C-160.

ARGUMENT

In Packer Corporation v. State of Utah, 285 U. S. 105, 79 A. L. R. 546, the Court considered a state statute prohibiting tobacco advertising on bill boards, street car signs and placards, but not prohibiting such advertising in newspapers and magazines; and it was held by the Court that the statute was not in violation of the Constitution and that it is a reasonable ground of classification that the state has power to legislate with respect to persons in certain situations and not with respect to those in a different one.

In Peet Stock Remedy Co. v. McMullen, 32 F. (2d) 669, a statute of Nebraska relating to Veterinary Medicine and Surgery was held not invalid for violating the Fourteenth Amendment as depriving manufacturers of livestock remedy products of property without due process and discriminating against them by requiring license for giving instructions and information to purchasers of remedies, notwithstanding that persons acting gratuitously, County Extension Agents, Army veterinarians and those of U. S. Bureau of Animal Industry, or State Department of Agriculture, could do the same acts without obtaining a license.

In Erdman v. Great Northern Life Insurance Co., 253 Mich. 579, 235 N. W. 260, a statute was considered which provided for examination in certain subjects for those who wished to become chiropractors and in a wider range of subjects for those desiring to become doctors, physicians or surgeons. It was held that persons in the respective classes were treated the same as others in the same class and that there was no discrimination.

In Missouri ex rel. Hurwitz v. North, 271 U. S. 40, it was held that a statute which places all physicians in a single class and prescribes a uniform standard of professional attainment and conduct as a condition of the practice of that profession and a reasonable procedure applicable to them as a class to insure uniformity to that standard does not deny the equal protection of the law within the meaning of the Fourteenth Amendment.

In People v. Monroe, 349 Ill. 270, 79 A. L. R. 605, 615, the Court said:

> "The legislature has a broad discretion in making classifications for police regulation and the requirement of the Constitution that laws shall be general do not mean that every statute shall have effect upon every individual and in every locality. It is for the legislature to determine when the conditions exist calling for the exercise of police power to meet existing evils, and when the legislature has acted the presumption is that the act is a valid exercise of such power."

In Graves v. Minnesota, 272 U. S. 425, 71 L. Ed. 331, the Court said:

"By enacting the present statute the State has determined through its legislative body that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute * * * and the case is to be considered in the light of the principle that the state is primarily the judge of regulation required in the interest of public safety and welfare, and its police statute may only be declared unconstitutional when there are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest."

A statute will not be invalidated upon the ground of class legislation if as a matter of fact it is found that the danger is characteristic of the class named, even though others may do the same and go unpunished. See in this connection, People v. Zimmerman, 278 U. S. 63, 73 L. Ed. 84; Iindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 80-81; Honnold Sup. St. Law, page 305.

The State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.

The rules for determining whether a statute contravenes the equal protection clause are set forth in Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 79:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but ad-

mits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

We submit that under the authorities dealing with the subject the conclusion is inevitable that the legislature may deal with those engaged in a single profession without at the same time and in the same statute, or in other statutes similarly dealing with those engaged in other professions.

The appellant alleges in his complaint that the Oregon Act regulating dental advertising is unconstitutional on the five different grounds enumerated and set forth on page seven of appellant's brief.

While upon the surface there are five grounds of unconstitutionality alleged in appellant's attack on the Oregon law, there are actually but two questions to be presented to the Court. The reason for narrowing appellant's position arises from the fact that the Oregon Act is one that was enacted by the Oregon State Legislature in exercise of the police power vested in the State as a sovereignty.

The first of the two questions to be disposed of by the United States Supreme Court is: Is the Act under question a valid exercise of the police power? The second question is: Is the Act in question class legislation?

If the Oregon Act is the result of a legitimate exercise of the police power then the alleged grounds of unconstitutionality, (a), (b), (d), and (e) on page seven of appellant's brief do not render it invalid. This can be easily seen by considering each of the grounds separately.

Assuming that this act is a valid one under the police power, the fact that it attempts to deprive appellant of his property without due process of law does not render it unconstitutional, as stated in 12 C. J. 1197:

> "The constitutional guarantees that no person shall be deprived of life, liberty, or property without due process of law, do not limit, and were not intended to limit, the subjects on which the police power of a state may lawfully be exerted. These guarantees have never been construed as being incompatible with the principle, equally vital, because essential to peace and safety that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community."

In the case of Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, this Court in dealing with the constitutionality of a statute of Pennsylvania, said, page 683:

> "It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights

which are secured by the Fourteenth Amendment of the Constitution of the United States.

It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that Amendment; for it is the settled doctrine of this Court that, as government is organized for the purpose, among other things, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the states." See

Mugler v. Kansas, 123 U. S. 663.

Butcher's Union Co. v. Crescent City Co., 111 U. S. 746, 751.

Barbier v. Connolly, 113 U. S. 27.

Yick Wo v. Hopkins, 118 U. S. 356.

In Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, after setting forth the purpose and intention of the Fourteenth Amendment, this Court declared, page 31:

"But neither the Amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

Again, assuming that this Act is a valid exercise of the police power, the fact that it impairs the obligations of

contracts ground (b) of appellant's objections, entered into between the appellant and his advertisers, does not necessarily render the Act unconstitutional. This fact is most elementary. As stated by the Supreme Court of the United States in Manigault v. Springs, 199 U. S. 473, 480, 26 S. Ct. 127:

> "It is the settled law of this Court that the interdiction of statutes impairing the obligations of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power which in its various ramifications is known as the police power, is an exercise of the sovereign right of Government to protect the lives, health, morals, comfort, and welfare of the people and is paramount to any rights under contracts between individuals.
>
> "Familiar instances of this are where parties enter into contracts to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State prohibiting the establishment or continuance of such traffic; in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."

Assuming that this Act is a valid Act under the police power, the fact that it may abridge the privileges or immunities of citizens of the United States as alleged in ground (d) does not render it unconstitutional. As stated in 12 C. J. 1122:

> "Neither the guaranty contained in the original constitution of the privileges and immunities of citizens of

the several states nor that contained in the Fourteenth Amendment of the privileges and immunities of the citizens of the United States, in any wise takes away or impairs the police power of the several states to pass laws for the promotion of the health, morals, safety, and general welfare of persons subject to their jurisdiction."

See also:

Hodges v. United States, 203 U. S. 1, 27 S. Ct. 6.

Giozza v. Turnan, 148 U. S. 657, 13 S. Ct. 721.

In re Kemmler, 136 U. S. 436.

Barbier v. Connolly, 113 U. S. 27.

As to the other part of ground (d) that pertaining to the Act's violation of Section 20, Article 1 of the Constitution of the State of Oregon, the Supreme Court of Oregon has already passed upon that in its opinion. Its conclusion in that respect will not be disturbed by the Supreme Court of the United States. The question of whether a State law violates a State Constitution is a matter for the state court to decide. The state court having decided it, we respectfully submit its ruling will not be changed by the Supreme Court of the United States.

Ground (e) of plaintiff's complaint seems to me to be another way of stating ground (a). If it is not that, but is instead an objection to the act on the ground that the restrictions are unreasonable and unlawful and such as not within the police power of the State, then it is an objection that this Act is invalid under the police power due to the

lack of relationship between the Act and the public health, safety, morals or general welfare. If it is this last consideration, then it presents the first of the two questions before the Supreme Court.

In other words, the first question is: Is this Act a valid exercise of the police power? If it is, then the above constitutional objections have no bearing, because they are not limitations or restrictions upon an act of a state legislature passed in the legitimate exercise of the police power of the state.

The other question still confronting us is: Is the Act which regulates the advertising of dentists only and not the advertising of members of other professions, class legislation? This question still remains even if it is assumed that this Act is a valid exercise of the police power. It still remains because the police power may not be employed to enact class legislation, as stated in 12 C. J. 1158:

> "Such statutes are valid as long as they apply equally and uniformly to all persons similarly situated, but they are in contravention of the equality clause when the classfication or discrimination provided for is unreasonable or has no substantial relation to the object of the Act."

We respectfully submit that this Act is not class legislation, because it is applicable to all members of the dental profession. It does not apply to some of them only. To render this Act unconstitutional on the ground that it is class legislation, the appellant would have to show that

the classification by the legislature of the various professions into the legal, medical, and dental is an unreasonable classification and that the regulation of the dental profession in this manner has no bearing or relation to the public health, safety, or welfare.

In making its classifications the legislature of a state is allowed a wide discretion.

In Barrett v. Indiana, 229 U. S. 26, 29, 33 S. Ct. 692, the Court said:

> "The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is and may be allowed wide discretion."

In Halter v. Nebraska, 205 U. S. 34, 27 S. Ct. 419, the Supreme Court sustained a statute forbidding the use of representations of the national flag for advertising purposes, but permitting the printing of representations of the flag in newspapers, periodicals, books, pamphlets, etc., when disconnected with advertising.

In Murphy v. California, 225 U. S. 623, 32 S. Ct. 697, a municipal ordinance prohibiting the keeping of billiard or pool tables for hire was held not to deny the equal protection of laws because hotel keepers were allowed to maintain them for their registered guests.

CONCLUSION

An examination of the statutes adopted by the various states and an inquiry into the history of that legislation reveals the fact that most of the legislation providing grounds for the revocation of the licenses of dentists are of comparatively recent origin. Legislation has been enacted for the purpose of keeping pace with evils as those evils arise. It must be presumed that the Oregon Statute was in practice intended to prevent certain evils and that those evils would exist if it were not for the statute. If it be considered that an evil has come into existence because of the doing of the acts which the Oregon Statute is designed to prevent, then inevitably the conclusion must be that the Oregon Statute is valid. The fact that dental organizations, national, state, county and city, are practically unanimous in insisting upon legislation designed to prevent the commercialization of the profession is the strongest kind of an indication that evils do exist and that legislation like the Oregon Statute is necessary to prevent those evils.

In closing our brief we quote at length from the decision of *Barton v. State Bar of California*, 209 Cal. 677, 289 Pac. 818 (1930), where the Court, in upholding the code of the California bar which prohibited advertising and solicitation except by use of ordinary professional cards or conventional listings in legal directories, said:

> "Petitioner earnestly argues that rule 2 which prohibits the solicitation of professional employment by

advertisement is an unreasonable regulation. He argues that, inasmuch as advertising is universally regarded as a legitimate activity, an activity indispensable to the success of business concerns, it follows that a rule prohibiting the solicitation of professional employment by advertising is unreasonable. In support of his contention he states that 'no amount of preaching can alter the cold, indisputable fact that the law has ceased to be a sacrosanct profession and has become a highly competitive business.' It is admitted, of course, that the rule is not arbitrary and discriminatory with reference to the members of the legal profession, for it applies to each and every member with equal force. The point made, therefore, is that the rule is discriminatory against the legal profession as a whole, in that the members are prohibited from doing that which others in commercial occupations and in business are permitted to do as a matter of course.

"In the consideration of the reasonableness of this rule, it should be born in mind that it is a rule proposed and promulgated by the members of the profession itself, and is not a rule forced upon the profession by a law-making body not in sympathy, perhaps, with the problems of the legal profession. The State Bar Act was passed as the result of an insistent demand for a more effective maintenance of proper professional standards. By said act the State Bar, consisting of all members of the legal profession entitled to practice law in this state, was charged with the duty of keeping its own house in order—with responsibility for the qualifications, conduct, and discipline of its members. 15 Cal. Law Review, 313. It should also be borne in mind that this rule is not a 'hangover' from the sixteenth and seventeenth century, 'when (to quote from petitioner's brief) social and economic conditions were entirely different from those which prevail in the twentieth century in the United States.' It was approved by the Supreme Court on May 24, 1928, and, having been adopted by the representatives of the state

bar, may be presumed to represent the ideas and attitude of the legal profession as a whole. It is perhaps by virtue of the fact that the profession of the law has come to be considered by some attorneys solely as 'a highly competitive business' that it became necessary to give legal sanction to a rule which had theretofore been enforced merely by public opinion.

"It is obvious, we think, that the legal profession does stand in peculiar relation to the public, and that there exists between the members of the profession and those who seek its services a relationship which can in no wise be regarded as analogous to the relationship of a merchant to his customer. For instance, it may be pointed out that, if a customer discovers that one merchant is unworthy of his patronage and trust, he does not thereby brand all merchants as dishonest and unethical, whereas, if a client becomes convinced that the attorney to whom he has entrusted the protection of his interests is unworthy of the trust reposed in him, he is very apt indeed to classify attorneys as a class as unworthy of trust and to feel that they are all scoundrels. For this reason alone it is important to the legal profession as a whole that nothing shall be done by any member which may tend to lessen in any degree the confidence of the public in the fidelity, honesty, and integrity of the profession. And it is by reason of the confidential relationship existing between attorneys and clients that certain rules and regulations are applicable to the profession which are not applicable to a business. In Re Galusha, 184 Cal. 697, 698, 195 P. 406, it was said: 'The adequate protection of public interests, as well as inherent and inseparable peculiarities pertaining to the practice of law, require a more detailed supervision by the state over the conduct of this profession than in the case of almost any other profession or business.' And in State Bar v. Superior Court (Cal. Sup.) 278 P. 482, 485, the Court said: 'The profession and practice of the law * * * is essentially and more largely a matter of public interest and

concern, not only from the viewpoint of its relation to the administration of civil and criminal law, but also from that of the contacts of its membership with the constituent membership of society at large, whose interest it is to be safeguarded against the ignorances or evil dispositions of those who may be masquerading beneath the cloak of the legal and supposedly learned and upright profession.'

"Notwithstanding the declaration of the petitioner, we do not believe that the profession of the law is, or ought to be, merely 'a highly competitive business.' And because it is not, and because it is necessary that the public should not be given the idea that it is so considered by the members of the profession, that the rule against the solicitation of business by advertisement is a reasonable regulation. As was said in People ex rel. Attorney General v. MacCabe, 18 Colo. 186, 32 P. 280, 19 L. R. A. 231, 36 Am. St. Rep. 270: 'The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares.' And as was said in Canon 27 of the Canons of Ethics of the American Bar Association: 'The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust.'

"Rule 2 expressly excepts the publication or use of ordinary professional cards, and the conventional listings in legal directories. It, therefore permits the practitioner to keep his name before the public in the form and to the extent designated in the rule. Inasmuch as all the members of the profession are alike forbidden to do more than this, this should be sufficient. It can readily be understood how unfavorably the public

would react toward the profession as a whole if there were published large full-page advertisements extolling the learning, ability, and capacity of an attorney 'to get results.' It would be hard to draw the line as to what was improper and what was proper in advertising, and the regulation by the state bar which prohibits all advertising except professional cards and conventional listings is, we think, a reasonable one."

The language used by the California court is as applicable to the dental profession as to the legal profession, particularly in view of statements by counsel that the dental profession and not the public forced the passage of ch. 189, Laws 1933.

We respectfully submit that in the enactment of the Statute of 1933 the Oregon Legislature did not exceed the limitations placed upon the power of the sovereign to enact legislation for the health, peace, safety and general welfare of the public.

APPELLEES' STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT ON APPEAL.

The appeal does not involve a substantial Federal question.

No substantial Federal question is raised if the Supreme Court of the United States has previously passed

upon the contention; for the Supreme Court of the United States has decided that no substantial Federal question forming a basis for review by the Supreme Court of the United States of a decision of a State Court, is presented by claiming that a constitutional right has been invaded where the question has been settled by previous decisions of the Supreme Court of the United States.

> Levering & G. Co. v. Morrin, 289 U. S. 103, 108, 77 L. Ed. 1062, 1066.
>
> Minneapolis & St. Paul & Sault Ste. Marie Railway Co. v. C. L. Merrick Co., 254 U. S. 376, 65 L. Ed. 312.
>
> Utley v. St. Petersburg, 292 U. S. 106, 109, 112, 78 L. Ed. 1155, 1158, 1159.

In Dr. Bloom, Dentist, Inc., v. Cruise, 259 N. Y. 358, the Court considered Rule 4, which reads as follows:

> "Advertising by means of large display, glaring, illuminated or flickering light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head."

The Oregon Statute (Chapter 166, Laws of Oregon 1933) prohibits:

> "Advertising by means of a large display, glaring light signs or containing as a part thereof the representation of a tooth, teeth, bridge work, or any portion of the human head."

The New York Court held that Rule 4 was valid and enforceable; and on appeal from the decision of the highest State Court of New York the Supreme Court of the United States (see 288 U. S. 588), on January 23, 1933, rendered an opinion, which we here set down in full.

> "The appeal herein is dismissed, for the want of a substantial Federal question. Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 S. Ct. 231; Douglas v. Noble, 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303; Missouri ex rel. Hurwitz v. Nohtr, 271 U. S. 40, 93, 70 L. Ed. 818, 46 S. Ct. 384; Graves v. Minnesota, 272 U. S. 425, 428, 71 L. Ed. 331, 47 S. Ct. 122; Lambert v. Yellowley, 272 U. S. 581, 596, 71 L. Ed. 422, 428, 47 S. Ct. 210, 49 A. L. R. 575; People v. Painless Parker Dentist, 85 Colo. 304, 275 Pac. 928, 280 U. S. 566, 74 L. Ed. 620, 50 S. Ct. 25; State Dental Examiners v. Miller, 90 Colo. 193, 8 Pac. (2d) 699, 287 U. S. 563, ante, 496, 53 S. Ct. 6."

The questions and the principles involved in the Bloom case were the same as the questions and principles involved in the instant case; and therefore the questions have been previously decided by the Supreme Court of the United States with the result that a substantial Federal question is not involved in the instant case.

ALLEGED CONFLICT IN STATE DECISIONS.

Appellant claims that there is a conflict in the decisions of the State Courts as to the constitutionality of statutes similar to the Oregon statute, and appellant cites as

cases holding that such statutes are unconstitutional decisions from the Courts of Ohio, Texas, Colorado and Illinois as follows:

Ohio: Ex parte Craycroft, 24 Ohio N. P. (N. S.) 513.

Texas: Waller v. State, 68 S. W. (2d) 601. Decided Jan. 29, 1934.

Colorado: Chenoweth v. State Board of Medical Examiners, 57 Colo. 74.

Illinois: Kalman v. Walsh, 355 Ill. 341-347; Schireson v. Walsh, 354 Ill. 40.

Appellant points out that a similar statute has been held to be constitutional by the Supreme Court of Washington and cites:

Laughney v. Maybury, 145 Wash. 146, 54 A. L. R. 393.

Ex parte Craycroft, 24 Ohio N. P. (N. S.) 513, was a habeas corpus proceeding and was decided by the trial court only and not by the appellate court.

In Waller v. State, 68 S. W. (2d) 601, decided Jan. 29, 1934, the Court states in substance that while the Court entertains grave doubt as to the constitutionality of the Texas statute, nevertheless it was not necessary to decide the constitutional question. Moreover, a mere reading of the opinion of the Texas Court discloses that the Court did not have the benefit of a full presentation of the authorities.

The case of Chenoweth v. State Board of Medical Examiners, 57 Colo. 74, was decided by a divided Court; and moreover it is doubtful whether the Colorado Supreme Court, if called again to decide, would follow the Chenoweth case, for in People v. Painless Parker Dentist (1929) 275 Pac. 928, 85 Colo. 304, the Colorado Court said:

> "In the Chenoweth case it was held that our General Assembly may enact reasonable regulations, of which the Courts may judge, for the examination of those who would practice medicine. And it was held in that case that a regulation of the General Assembly authorizing a revocation of a physician's license for publishing an advertisement relating to diseases of the sexual organs was void for uncertainty and in violation of the Fourteenth Amendment to the Federal Constitution and of our own Bill of Rights. There may be expressions in the majority opinion that give color to some things contained in the defendant's brief here; *but that decision—and we are not to be understood as approving of it*—is not authority for the defendant's contention here." (Italics ours.)

In this connection see People v. Painless Parker Dentist, 280 U. S. 566.

The cases from Illinois went off on rulings to the effect that there had been a failure to comply with statutory procedural provisions and the discussion of the constitutional question was only incidental, and furthermore, since the decision of the two Illinois cases the 1933 Illinois Legislature has enacted a statute which may with propriety be classed with the Oregon Statute, thus indicating that the duly constituted authorities of Illinois did not inter-

pret the Illinois decisions as holding statutes like the Oregon statute to be unconstitutional.

Appellees therefore respectfully submit that the record does not present a substantial Federal question.

Respectfully submitted,

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HARRY M. KENIN,
RALPH B. HERZOG,
HERMAN D. KENIN,
FRANK P. KEENAN,
Counsel for Appellees.

"APPENDIX A"

Hon. Ernest E. Cole,
Deputy Commissioner & Counsel,
State Department of Education,
Education Building,
Albany, New York.

Re: *Dental Rules and Regulations.*

Dear Sir:

I have your letter of September 9, 1933, in which you state that the Board of Regents desire an opinion as to the legality and validity of Rules 4 and 8 of the Rules adopted by the Board of Regents Governing Dental Advertising and as to their power and authority to enact same.

In my opinion, the said rules are legal and valid under the power and authority vested in the Regents by the Education Law.

Rules 4 and 8 aforesaid, together with the preface thereto, read as follows:

"Dental Advertising—Education Law.

Section 1311. Revocation of license. * * * 2. If any practitioner of dentistry be charged under oath before the board with unprofessional or immoral conduct, * * * the board shall notify him to appear before a committee of three of the board at an appointed time and place, with counsel, if he desires, to answer said charges.

In the administration of the law, the following forms of advertising are considered unprofessional and objectionable:

Rules Governing Dental Advertising

* * *

4. Advertising by means of large display, glaring, illuminated or flickering light, signs, or containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head.

8. The employment of letters, handbills, posters, circulars, cards, stereopticon slides, motion pictures, radio, newspapers or other advertising devices for the purpose of soliciting patronage, except that a dentist may use personal professional cards of a modest type announcing his name, title, address, telephone number and office hours."

The aforesaid Rules are to be considered in conjunction with the provisions, purpose and spirit of the Education Law, Sections 1300 to 1314, relating to the practice of dentistry, now generally referred to as the Dental Practice Act. It was formerly part of the Public Health Law, Sections 190 to 203, the constitutionality thereof having been upheld (*People v. Griswold*, 213 N. Y. 92). It was enacted for the purpose of licensing the qualified and protecting the afflicted from the pretensions of the ignorant, the unskilled, the unscrupulous and the unlicensed. It was designed to prohibit and punish fraud and deception and to bring the practice under such control that, so far as possible, the ignorant, the unscientific, the unskilled and the unscrupulous practitioner might be excluded.

The Dental Practice Act is the result of many and varied efforts on the part of the Legislature, by frequent amendments since the year 1868, adequately to provide for the practice of dentistry. Though by the first statute on

the subject, to-wit: Chapter 152 of the Laws of 1868, there was a form of regulation as to the qualifications of dentists, it was not until the enactment of the laws of 1879, Chap. 540, that there was a prohibition against the practice of dentistry by those who had not complied with the statute and had not registered. With each amendment came a definite strengthening of the laws with a view to maintaining adequate qualifications for admission to practice dentistry, proper standards for practice, and sufficient enforcement machinery.

In the year 1933, the Dental Practice Act was extensively revised (Chap. 609, L. 1933). Many of the provisions were made to conform, as far as possible, to those of the Medical Practice Act (Education Law, Secs. 1250-1266) in view of the fact that the latter Act had enabled the medical profession to continue its high standard. The following are the pertinent provisions of law now in effect:

(State Constitution, Art. IX, Sec. 2):

"University of State of New York. Regents. The corporation created in the year one thousand seven hundred and eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the Legislature, shall be exercised by not less than nine Regents."

(Education Law, Sec. 46):

"Legislative power. Subject and in conformity to the constitution and laws of the state, the regents shall *exercise legislative functions* concerning the educational system of the state, determine its educational policies, and except as to the judicial functions of the commissioner of education *establish rules for carrying into effect the laws and policies of the state*, relating to education, and the functions, powers, duties and trusts

conferred or charged upon the university and the education department. * * * "

(Education Law, Sec. 51):

"Supervision of professions. Conformably to law the regents may *supervise* the entrance regulations to and the licensing under and *the practicing of the professions of medicine, dentistry,* veterinary medicine, pharmacy, optometry and chiropody, and also supervise the certification of nurses, public accountants, certified shorthand reporters, architects, and members of any other profession which may hereafter come under the supervision of the head of the board of regents. * * * "

(Education Law, Sec. 1311, par. 2):

"Revocation of licenses. * * * 2. The license and registration of a practitioner of dentistry may be revoked, suspended or annulled, or such practitioner reprimanded, censured or otherwise disciplined in accordance with the provisions and procedure defined in this article upon decision and due hearing in any of the following cases: (a) that the dentist has been guilty of unprofessional or immoral conduct; (b) that the dentist is grossly ignorant or inefficient in the practice of dentistry; (c) that the dentist is guilty of fraud or deceit in his practice of dentistry or in procuring admission to practice; (d) that the dentist has employed, hired, procured or induced a person not licensed to practice dentistry in this state, to so practice; (e) that the dentist has aided and abetted in the practice of dentistry a person who is not licensed to practice dentistry in this state; (f) that the dentist has been convicted in a court of competent jurisdiction, either within or without the state, of a crime; (g) that the dentist is guilty of untrue, fraudulent, misleading or deceptive advertising."

(Education Law, Sec. 1314):

"Department supervision. The provisions of this article shall be administered subject to section fifty-one of this chapter."

Just as the laws relating to dentistry have gradually undergone evolutionary changes, consistent with the times and customs, so have the Rules enacted by the Regents with regard thereto. The history of the Rules dates back to May 4, 1917. At that time, a number of Rules, which did not include those hereunder discussion, were tentatively adopted because of the recalcitrant attitude of one of the dental corporations expressly made subject to the Rules of the Regents by Section 203, subd. B-4 of the Public Health Law as then in force (Regents' Minutes, May 4, 1917, p. 466). Licensed dentists were also subject to those Rules, for they were preceded by the statement, "In the administration of the law, the following forms of advertising are considered unprofessional and objectionable." The law then provided, as it does now, that a dentist's license might be revoked or he might be suspended for unprofessional conduct (Pub. H. L., Sec. 201, subd. 2). The Rules, so tentatively adopted, together with another Rule, were later formally adopted (Regents' Minutes, June 25, 1917, p. 512).

On June 26, 1924, the Rules were amended by the Regents, the amendments not being material here. The Regents then directed that, "Any violation of these rules shall be deemed unprofessional conduct within the meaning of Section 201, subd. 2 of the Public Health Law as applied to dentistry." When the provision in the Public Health Law relating to dentistry were repealed and reenacted, as amended, as Article 49 of the Education Law (L. 1927, Ch. 85), the reference in said Rules to the Public Health Law was changed to the Education Law.

Rule 4:

The Rules here in question were subsequently adopted. Rule 4 was adopted on December 18, 1930 (Regents' Min-

utes, Dec. 18, 1930, p. 136), and Rule 8 was adopted on March 16, 1933.

That the Regents have broad power to supervise the practice of dentistry, with legislative power to make rules with relation thereto, is evident from the provisions of law heretofore set forth (Dr. Bloom Dentist, Inc., v. Cruise, 259 N. Y. 358, cert, den. 278 U. S. 588 [77 L. Ed. 967]; Davis v. Sexton, 211 A. D. 233). In the Bloom case, supra, Rule 4, which is now under consideration, was passed upon and held to be valid and enforcible. The rules apply to both corporations and licensed dentists, and dental corporations, by the very statute by which the Legislature extended to them a limited tolerance, may not operate except through licensed dentists (Ed. L. Sec. 1313, subd. B-4).

Under the statutes heretofore referred to, every phase of a dentist's professional conduct, whether he is acting for himself or a corporation, is under the supervision of the Regents and subject to their Rules, which have the force and effect of statute (Dr. Bloom, etc. v. Cruise, 259 N. Y. 358, supra; Matter of Davis v. Sexton, 211 A. D. 233; Peo. v. Nat'l. Assn. of Cert. Pub. Accts., 204 A. D. 288). That the advertising of dental corporations is made subject to the Regents' Rules by statute (Ed. L. Sec. 1313, subd. B-4) is no indication of an intention that a dentist's conduct in his advertising is not to be subject to the Rules enacted by the Regents under their express power to legislate and establish rules regarding the professions under their supervision. These powers as to licensed dentists were possessed by the Regents long *before* they were vested with any power as to dental corporations and continued thereafter. By giving the Regents additional specific powers as to dental corporations, the Legislature did not diminish the powers already possessed by them as to members of the professions coming within their jurisdiction.

No authority was ever granted to organize corporations to practice dentistry, either under the Public Health

Law or the Education Law or prior general laws regulating the practice of dentistry, or under the laws governing corporations. The statutes only authorized the licensure of individuals as dentists. When the statutes relating to the practice of dentistry are read in connection with the statutes authorizing the formation of corporations, it is obvious that they do not relate to the same subject matter, and that in enacting the latter, the Legislature was dealing with something utterly foreign to the former (In re Co-operative Law Co., 198 N. Y. 479). The special provisions of law relating to dentists were not modified or affected by the general provisions authorizing the formation of business corporations. (Hannon v. Siegel Cooper Co., 167 N. Y. 246; Peo. v. Woodbury D. Inst., 192 N. Y. 454; Matter of Lewis v. Woodbury D. P. Co., 106 Misc. 78; Matter of Lewis v. Harlem Dental Co., 189 A. D. 359; Op. Atty. General 1911, Vol. 2, p. 567).

Notwithstanding the fact that corporations had no authority as such to practice dentistry, a number of certificates of incorporation of dental corporations were inadvertently filed by the Secretary of State prior to the year 1916. The unauthorized existence of these purported corporations was either not discovered or was not considered serious until about the year 1915. As by that time they were going concerns with established businesses, the Legislature, instead of causing their destruction, apparently deemed it politic to permit them to continue to operate, subject to certain restrictions. And so, the proviso formerly contained in the Public Health Law, Sec. 203, subd. B-4, and, as amended and now contained in Section 1313, subd. B-4, of the Education Law, was enacted. Thereby the Legislature extended a highly limited tolerance to these corporations which had assumed to practice dentistry under certificates of incorporation, filed prior to January 1, 1916. However their restricted legalization was conditioned upon strict compliance by them with the statutory conditions set forth in said proviso, one of which was that, *"Their advertising shall be subject to the rules of the regents."*

The very language of the Court of Appeals in the Bloom case, supra, in which the plaintiff was a dental corporation subject to the aforesaid statutory restrictions, shows that the Court looked behind the cloak of these unlawful creations with a view to getting at the real evil. The Court there said, "The state's power to establish reasonable standards *for admission to practice* a profession is undoubted (cases cited). We conclude that a reasonable supervision *after admission* is likewise a lawful exertion of sovereignty." Later the Court said, "Not only is the Board of Regents, as head of the educational system of the state, the statutory guardian of the policies of the state in relation to curbing deception or fraud by those subject to its supervision (Education Law, Sec. 46), *but its specific supervisory powers over the practice of dentistry (Ed. Sec. 51) enable it, within reasonable limits, to prescribe canons by which conduct deemed by it, in the exercise of fair judgment, to be unprofessional and objectionable, may in the interest of rescuing that profession from vulgar commercialism, be banned. Prohibition against the use of flamboyant signs by members of a profession cannot be said to be unreasonable.*"

Mr. Justice Collins, whose order in the said Bloom case was affirmed by the Court of Appeals, stated in his opinion (N. Y. L. J. Sp. T. I., N. Y. Co. July 14, 1931):

> "The prohibition of electric display dental advertising was fashioned not only as a protection to the public against *quackery* but was designed to *elevate the standards of the profession.*"

Mr. Justice Martin, in his dissenting opinion in the Appellate Division in the said Bloom case, his opinion having been approved, in effect, by the Court of Appeals, when reversing the Appellate Division, said (234 A. D. 274):

> "In an effort to maintain *proper standards* and to prevent advertising of a character tending to deceive

or mislead the public, the Board of Regents may adopt any reasonable rules to promote the welfare of the public dealing with dentists and to assure them that such practitioners are capable and responsible."

The statutes and regulations of over two-thirds of the other states of the United States and those of British Columbia, New Brunswick, Ontario and Saskatchewan, Canada, have been examined and found to be more stringent, in a number of respects, than those in New York.

By virtue of the statutory powers granted to the Regents, they had authority to adopt Rule 4. Under the decisions of the Courts of this State, Rule 4 is valid and reasonable. The Board of Regents heretofore refused to modify it. The State Board of Dental Examiners denied an application to suspend its operation. It is supported by organized dentistry and public opinion, and is in accord with the statutes of several other states. "The Regents' laudable endeavor to elevate professional standards among dentists" by Rule 4 should not be thwarted (Bloom v. Cruise, 259 N. Y. 358, 364, supra).

Rule 8:

Rule 8 which declares unprofessional any form of advertising by a dentist for the solicitation of patronage, except by way of a professional card, is now attacked on various grounds, which, in summary, are: (1) the Rule is prohibitory and not regulatory; (2) the statute providing for the revocation of licenses indicates that advertising is to be permitted; (3) the elimination by the Legislature of a proposed amendment to the statute discloses the intent that dental advertising is not to be banned; (4) advertising by a dentist may not be considered unprofessional conduct; (5) the Legislature may not delegate power to enact a rule making it unprofessional for a dentist to advertise. These grounds, of a legal nature, are without any potency in my opinion.

(1) Rule 8 does not affect all forms of dental advertising, for it is therein provided that "a dentist may use

personal, professional cards of a modest type announcing his name, title, address, telephone numbers and office hours." While the effect of the rule is to make unprofessional that which is generally considered to be advertising *"for the purpose of soliciting patronage,"* the Regents may declare that to be unprofessional which they reasonably believe to be so, and to adopt a rule of guidance accordingly. A rule of that nature is supervisory and regulatory. It is not prohibitory in the sense urged as an objection thereto. The dentist is not thereby prohibited from practicing his vocation but he is warned that if he advertises in the manner specified for the purpose of soliciting patronage, he is practicing unprofessionally. If he so advertises, he subjects himself to disciplinary proceedings under the law, with the power in the Regents, after due notice and hearing and a finding of guilt, to discipline him by way of revocation of his license, suspension or censure, and with the right of the accused to a review by certiorari in the Appellate Division of the Supreme Court (Ed. L. Sec. 1311).

Rule 8 is in no sense to be likened to ordinances relating to advertising sky signs of *business concerns* and business advertising signs on fences such as those considered in Peo. v. Murphy, 195 N. Y. 126 and Peo v. Green, 85 A. D. 400, cited in support of the objections to said Rule. There the ordinances were held to be unconstitutional on the ground that property owners were unlawfully deprived of their property. As was stated in those decisions, *the business advertisements did not affect the health, morals, safety or welfare of the community,* which are the vital considerations which gave rise to Rule 8.

(2) It is claimed that as Section 1311, subd. (g) of the Educational Law provides that, "Untrue, fraudulent, misleading or deceptive advertising" is a ground for the discipline of a dentist, and as advertising of a dental corporation is subject to the Regents' rules (Ed. L. Sec. 1313, Subd. B-4), the Legislature intended that truthful and honest advertising is to be permitted. Thus it is argued that the Rule is repugnant to law. The Legislature

allowed to the Regents wide discretion in their rules and in determining what constitutes unprofessional conduct. Absolutely no restrictions or qualifications as to what the Regents may or may not consider to be unprofessional conduct appear in the statute. Accordingly, it is reasonable to infer, the Legislature intended that if the Regents in the reasonable exercise of their powers deemed dental advertising to be unprofessional, they might declare it so, but under no circumstances was there to be any fraudulent or deceptive or misleading advertising. The statutory provision, as to fraudulent advertising, was not intended to be a limitation on the power of the Regents to declare certain forms of advertising for patronage or any other act to be unprofessional.

(3) When the bill for the amendment to Section 1311 of the Education Law was first introduced in the Legislature for enactment in 1933, it contained a subdivision then known as section "(h)", which provided as a ground for the discipline of dentists "That the dentist has violated the rules of the Regents governing advertising or any other Regents' rules." That subdivision was eliminated and the balance of the amendment to Section 1311 was passed. It is claimed, again by implication, that the Legislature intended thereby that there should be no rule governing advertising. The omission of "(h)" was cutting out useless surplusage.

According to the records of the Legislature, the amendment aforesaid was passed by the Senate on April 8, 1933, and by the Assembly on April 10, 1933, and was signed by the Governor on April 29, 1933 (L. 1933, Ch. 609). Rule 8 was adopted by the Regents on March 16, 1933, and had been proposed prior thereto. Thus, when the law was passed, the Rule had been in force for some time, and the claim that the Regents endeavored to do indirectly that which the Legislature refused to do directly, is unfounded. The purpose of proposing said subdivision "(h)" seems to have been to add "teeth" to the law, but apparently the Legislature deemed it unneces-

sary to do so, for after the Regents by a Rule had declared advertising for patronage to be unprofessional, for which a dentist might be disciplined, it was surplusage to add a clause to the statute making violations of all their Rules grounds for disciplinary proceedings.

(4) The term "unprofessional" as set forth in the statute does not necessarily mean immoral conduct or acts involving moral turpitude. In Webster's New International Dictionary (Merriam Series of 1931) "professional" is defined as "conforming to the *rules or standards* of a profession." "Unprofessional" has a shade of meaning which seems to have a leaning toward professional ethics, whereas "immoral" implies a relation to personal conduct (Yoshizawa vs. Hewitt, 52 F. (2d) 411).

The word "immoral" in the statutory phrase, "unprofessional or immoral conduct" does not color the word "unprofessional," nor should that phrase be so construed as to include only unprofessional conduct which is immoral (Re Davidson and Royal College of Dental Surgeons of Ontario, 57 O. L. R. 222). It is immaterial whether the act proscribed involves moral turpitude or that the practitioner may not intend to do anything wrongful (State Board vs. Jordan, 92 Wash. 234; aff'd. 95 Wash. 700).

Though "unprofessional" has been held by some authorities to be synonymous with "dishonorable," such definition does not militate against the establishment of another standard by which to test professional conduct and the right to practice a profession (Tucker vs. Williamson, 229 F. 201, 212; Dent vs. West Virginia, 129 U. S. 114; Peo. vs. Gorman, 346 Ill. 432; Peo. vs. Johnson, 344 Ill. 132; Peo., ex. rel. Chicago Bar Assn. vs. Berezniak, 292 Ill. 305; Simonson vs. Swenson, 104 Neb. 224; Jacobs vs. Board, 189 Cal. 709; State Medical Board vs. McCrary, 93 Ark. 511; Crabb vs. Board, 118, K 513; 269 U. S. 580).

In Bloom vs. Cruise, 259 N. Y. 358, 364, supra, the Court touched on this subject when it said:

"but it (Regents) specific supervisory powers over the practice of dentistry (Ed. L. Sec. 51) enable it, within reasonable limits to prescribe *canons* by which *conduct* deemed by it, in the exercise of fair judgment, to be *unprofessional and objectionable*, may in the interest of rescuing that profession from vulgar commercialism, be banned."

The very question here under consideration was presented to the Appellate Division of Ontario, Canada, in Re Davidson and Royal College of Dental Surgeons of Ontario, 57 O. L. R. 222, supra. In that case the statute provided that the license of a member of the Royal College might be suspended if he "has been found guilty of any infamous, disgraceful or improper conduct in a professional respect." There were no rules of guidance. The dentist published an advertisement in a newspaper by which the public were invited to his office to get sets of teeth at special prices—a "special ten-day offer." He was charged with improper conduct in a professional respect, and was found guilty. On appeal the finding was affirmed. The Court pointed out the close analogy between professional misconduct of an attorney and a dentist, and in referring to a prior case, observed that "conduct may be more disgraceful in a professional respect than in the common judgment of mankind."

It is unprofessional for a physician to advertise. Section 31 of the Principles of Professional Conduct of the New York State Medical Society reads as follows:

"(a) Physicians shall not make use of, or knowingly aid or permit others to make use of them as subject to any form or manner of advertising or publicity through lay channels either alone or in connection with others which shall be of such character as to invite attention to themselves or to their professional position, skill, qualifications, achievements, attainments, specialties, appointments, associations,

affiliations, honors, and, or of such character as would ordinarily result in their self aggrandizement; * * *.

(b) Physicians should not become or remain associated or identified with any corporation, organization, group or individual, medical or lay, resorting to or making use of direct advertising to the public for business of a medical or a therapeutic nature, or having to do with the diagnosis, care or treatment of the sick or injured, the maintenance of health or the prevention of disease."

For a lawyer to advertise for business has long been recognized by the profession at large as unprofessional, undignified and improper, and has been distinctly condemned by the Code of Ethics of the American Bar Association, adopted generally by the Bar Associations of this country, and specifically adopted by the New York State Bar Association on January 28, 1909. While said Code of Ethics has never been incorporated into our statutes it has been so far recognized by the Supreme Court that it is required that an applicant for admission to the Bar pass an examination as to the Code of Ethics (*Matter of Pouker*, 203 A. D. 520) and that a copy of the Code be furnished him upon his admission to the Bar (*Matter of Neuman*, 169 A. D. 638). Canon 27 of said Code of Ethics expressly provides that "*solicitation of business* by circulars or advertisement * * * is unprofessional" (*Matter of Schwartz*, 175 A. D. 335; 195 A. D. 194, affd. 231 N. Y. 642).

As the Appellate Division of the Supreme Court, under its power to discipline an attorney for unprofessional conduct, may enforce a canon of ethics adopted by Bar Associations, it is reasonable that the Regents under somewhat similar powers granted to them as to dentists may adopt and enforce a rule in effect similar to said canon of ethics. It is said that there is a distinction. It is claimed that advertising by attorneys is unprofessional because they are officers of the Court. The Pre-

amble to the Code of Ethics relating to attorneys makes no reference to the fact that attorneys are officers of the Court, but, after referring to the stability of the courts and all *departments of government,* and the future of the republic, declares: "It cannot be so maintained unless the *conduct* and *motives* of the members of our profession are such as to merit the approval of all just men."

It might just as well be argued that dentists through their licenses are public health representatives or arms of the government in treating mouth diseases and dental conditions, and therefore, because they are governmental agents, advertising by them is considered unprofessional. The fact that attorneys are officers of the court and dentists are governmental agents, is immaterial, for they are members of professions which are controlled by law, and their professional lives are supervised for the benefit of all. Thus, just as the Supreme Court may establish a standard of conduct to which the Bar must at its peril conform, so may the Board of Regents establish rules of conduct of dentists. As showing the trend towards prohibiting dental advertising, on April 18, 1933, an amendment to the dental laws of North Carolina was passed and ratified by the General Assembly of that state for the purpose of barring dental advertising. The amendment follows in form Section 207 of the North Carolina Code relating to attorneys, and provides that a dentist may be disciplined who "has by himself or another solicited professional business."

It would be difficult to catalogue every offense constituting unprofessional conduct, and though there are decisions to the contrary, according to the great weight of authority, the word "unprofessional" is not void for uncertainty (*Peo. v. Apfelbaum,* 251 Ill. 18; *Lehmann v. State Board of Accountancy,* 268 U. S. 394; *State Board v. McCrary,* 95 Ark. 511).

(5) The rule against the delegation of Legislative powers is not violated by the Regents' rules. (*Matter of Mandel v. Board of Regents,* 250 N. Y. 178; *Peo. v.*

Vondecarr, 175 N. Y. 440 *appd.* 199 U. S. 552; *Peo. ex rel. Chadbourne v. Voorhees*, 236 N. Y. 437; *Peo. v. Kaye*, 212 N. Y. 407; *Bellows v. Raynor*, 207 N. Y. 389; *Hawker v. New York*, 170 U. S. 189; *Reetz v. Mich.*, 188 U. S. 505; *Douglas v. Noble*, 261 U. S. 165; *Yoshizawa v. Hewitt*, 52 F. (2d) 411).

Under its police power, the State has the right to prohibit things that are harmful to the comfort, safety and welfare of society (*Thompson v. Van Lear*, 77 Ark. 506). There has been no improper delegation of this power which has been possessed by the Regents for years. Legislatures may delegate to statutory bodies the power to enact rules as to the conduct of members practicing a profession under licenses issued by those bodies. The cases on the rule making power of agencies of the State are legion (*Dr. Bloom, etc. v. Cruise*, 259 N. Y. 358, *supra; Ottinger v. Arenal Realty Co.*, 257 N. Y. 371, 378; *Cherubina v. Meenan*, 253 N. Y. 462, 463).

The Regents may exercise legislative functions and establish rules carrying into effect the laws and policies of the state relating to the trusts conferred upon them (Ed. L. Sect. 46). Their rules may thus be construed as statutes based on the police power of the State. which statutes should be upheld if they tend in the direction of safeguarding the public, even if they disturb the enjoyment of an individual right (*Peo. v. Griswold*, 213 N. Y. 92; *Peo. v. Ryan*, 230 A. D. 252).

In determining whether the rules in question are arbitrary or unreasonable, it must be borne in mind that the choice of measures is for the Regents, who are presumed to have investigated the subject, and to have acted with reason, not from caprice. There is nothing of an arbitrary or unreasonable character in the provisions of the Rules. They apply to all dentists. They impose no conditions which cannot be met readily. They are made enforceable in the mode usual in kindred matters on charges after due notice and hearing, subject to Court review (*Dent v. West Virginia*, 129 U. S. 114, 124).

The Rules have basis in reason. Their aim is to maintain high professional standards, to keep unsullied the integrity of the dental profession by preventing abuses, to protect the public from fraud which may result from advertising which may appear to be honest and truthful, and to prohibit the modern tendency to commercialize the profession. (*Brooks v. State,* 146 Ala. 153; *Griffin v. Powers,* 152 Tenn. 55; affd. 275 U. S. 495). A statement of the Court in the case of *Laughney v. Maybury,* 145 Wash. 146, is particularly applicable. There a statute which prohibited all advertising by an osteopathic physician was held valid, the Court saying:

> "The statute specifically mentions certain kinds of advertising that may be done and prohibits other kinds. That it prohibits, and was intended to prohibit, the kind of advertising with which the appellant was charged, and which he admitted, is doubtless true, and in our opinion, is valid. We have no doubt that the regulation or prohibition was in response to the prevailing opinion and demands of the public, including the vast majority or nearly all of the osteopathic physicians themselves and that the legislature so understood it, not simply from the standpoint of professional ethics, as argued on behalf of the appellant, but as suited and necessary for the common welfare."

Rule 8 was adopted after the Department's attention had been called to the unprofessional advertising carried on by dental corporations, chain store types of dental offices and by individual dentists. The rule was sponsored by the following: (a) The State Dental Society; (b) The nine component district societies of the State Society; (c) The Allied Dental Council of the State of New York; (d) The Executive Council of the State Dental Society; (e) The State Board of Dental Examiners; (f) The Deans of the registered Dental Schools in the state; and (g) many individual practitioners. All these organizations and groups urged the Department of Edu-

cation to enact said rule so as to free the dental profession from advertising and place it in that regard on the same plane as law and medicine. Of the dentists in this State, approximately 10,100 in number, I am informed that but a handful, *less than one per cent,* feel that they should have the right to advertise. Considering the foregoing and the records of my office of cases in which complaints have been made and charges filed, and proceedings instituted against advertising dentists of fraudulent, deceptive and misleading advertising, prior to the enactment of Rule 8, I am of the opinion that Rule 8 is a wholesome measure which will be of great benefit to the community and the dental profession.

As the professions in arts and sciences advance for the benefit of mankind, they should not be retarded by commercialism. When it is ascertained by a Board, duly empowered to issue licenses and to revoke them for unprofessional conduct, that any practices of the licensees are detrimental to the public, such practices may be declared unprofessional despite the fact that they may have been tolerated in the past. Such prior tolerance does not give any vested right to a licensee to continue, in the future, practices which are found to be unprofessional. Though a license issued to a dentist to practice his profession is a property right of which he cannot be deprived arbitrarily, it is nevertheless a privilege subordinate to the duty of the State to protect the public health (*Hawker v. New York,* 170 U. S. 189).

The Dental Practice Act is a public health statute, and under familiar principles, it should be equitably construed, with the vice toward which it is directed as a paramount consideration. The mind of the suffering man, like his body, is an abnormal condition. "He is inclined to grasp at shadows and to pursue the wind, and is easily misled into paying money for treatment that he does not need. The temptations to which a dentist is subject and the dangers to whcih patients are exposed by dental advertising are such that the public requires constant

protection, for thereby it is easy to have patients submit to unnecessary treatment. The practice of dentistry should not be allowed to degenerate into a scramble for patients in which the advantage will be with the unscrupulous. Nor should practices be permitted which would degrade the profession in the eyes of the public and render efforts to establish and maintain high ethical standards of no avail. The salutary purpose of the law to prevent such wrongs should not be destroyed by legal niceties, or the refining of refinement. Rather, the rule-making power of the Regents should be liberally interpreted so that a practice commonly known today as "racketeering" may not enter this profession.

Thought and consideration have been given to the briefs submitted on both sides by those interested before reaching the conclusions herein.

You are therefore advised that it is my opinion that the Rules of the Regents governing Dental Advertising are legal and valid and that the Board of Regents had authority to enact same.

Very truly yours,

JOHN J. BENNETT, JR.,
Attorney General.

"APPENDIX B"

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH.

HARRY SEMLER, Plaintiff,
vs.
OREGON STATE BOARD OF DENTAL EXAMINERS, et. al., Defendants.

OPINION
No. 109-931.

By this suit the plaintiff challenges the constitutionality of Chapter 166 of the Laws of 1933, relating to the practice of dentistry.

The law prior to amendment defined "unprofessional conduct," for engaging in which the penalty is revocation or suspension of the dentist's license, as follows: Employing what are known as "cappers" or "steerers" to obtain business. Obtaining of any fee by fraud or misrepresentation. Wilfully betraying professional secrets. Employing, directly or indirectly, any student or any suspended or unlicensed dentist to perform operations of any kind or to treat lesions of the human teeth or jaws or correct malimposed formations thereof. In making use of any advertising statements of a character tending to deceive or mislead the public. By the 1933 amendment the scope of the previous statutory definition of "unprofessional" conduct is enlarged so as to include therein certain designated types of advertising, namely: Advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional services; advertising by means of large display, glaring light sign; advertising "containing as a part thereof the representation of a tooth, teeth, bridge work, or any portion of the human head." Employing or making use of advertising solicitors. Employ-

ing "free publicity press agents." Advertising any free dental work or free examination. Advertising to guarantee any dental service. Advertising "to perform any dental operation painlessly."

The plaintiff is a duly licensed and practicing dentist of this State, with offices in the City of Portland. He alleges in his Complaint that he has been engaged in the practice of his profession in this state since June 8, 1918; that during that time he has resorted to advertising in most of the ways prohibited by the 1933 act; that he has acquired a degree of skill and ability in the practice of his profession superior to that of the majority of practicing; has acquired a very large business with a very large number of patients; that he and his assistants have treated approximately seventy-five thousand (75,000) patients, and now treat one hundred and fifty (150) patients daily; that he is able to represent truthfully that he possesses superior professional skill and ability and that he will guarantee dental services performed by him, and that all his advertisements have always been truthful and honest; that, if the statute is enforced his business will be destroyed or very materially impaired.

He contends that the legislation deprives him of his property without due process of law and is discriminatory and, therefore, violates provisions of the constitutions of the United States and of the State of Oregon.

The case is now before the court on demurrer to the complaint.

The plaintiff concedes that the old legislation is unobjectionable from a constitutional standpoint, but asserts that the amended act is arbitrary, and without any reasonable relation to any end within the competency of the state to attain, in that it prohibits advertising harmless in itself and without regard to the truth or falsity of the statements published; that, indeed, the actual legislative purpose was not to protect the public against fraud or imposition or the practice of unskilled or incompetent dentists, but that the real purpose was, by writing into the statute

law of the state, the code of ethics of the American Dental Association, to prevent honest advertising, and (to quote from the able brief of plaintiff's counsel):

> "to remove from the profession any dentist who desires to acquaint the public with his superior skill or with his willingness to render dental services for less money than another."

In this contention lies the kernel of the controversy. If the legislation is arbitrary, if it cannot be justified as an exercise of the State's power to enact laws in the interest of the public welfare, it is the duty of the court to declare it unconstitutional, because a law not enacted in good faith for the protection of the public good but passed from the sinister motive of annoying or oppressing a particular person or class of persons, is invalid as offending the fundamental principle of the quality of the laws. Yick Wo v. Hopkins, 118 U. S. 356.

On the other hand, it is the position of the defendants that the state has the power, in the exercise of its undoubted right to regulate the practice of a learned profession such as dentistry, to limit the dentist's use of the advertising medium, to the end that the public may be protected from the frauds, artifices and chicane of unscrupulous members of the profession.

The question, then, is whether this statute has been enacted pursuant to the police power of the state. That power has never been better defined than in the classic langauge of Chief Justice Shaw in the celebrated case of Commonwealth v. Algar, 7 Cush. (Mass.) 53, when he described it as

> "the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with or without penalties, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

In the enactment of such laws, the Legislature is not limited to the prohibition of acts which are in themselves harmful.

> "A calling," said the Supreme Court in Booth v. Illinois, 184 U. S. 425, "may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious."

That the practice of dentistry is subject to reasonable regulations by the Legislature, none will deny. It is today regarded as one of the learned professions. It is a calling which may be pursued, not as a matter of right, but only as a privilege granted by the state upon proof by the applicant that he is qualified by learning, skill and character to assume the duties and obligations and share in the rewards of that profession. The right of the state to impose such conditions cannot be called in question. Dent v. West Virginia, 129 U. S. 114. In that case the Supreme Court said that

> "the power of the state to enact such laws, regulating the performance of surgery, as are calculated to protect the people from ignorant pretenders and charlatans, has been established by repeated adjudications, and is now too firmly established to admit of doubt."

The practice of dentistry intimately concerns the public health. The relation between dentist and patient is one of trust and confidence. The patient places himself in the dentist's hands and is bound to rely implicitly on his knowledge, skill and honesty. Any law, therefore, which reasonably tends to protect the patient in that relationship comes properly within the state's police power, because the state has the right and the supreme duty of legislating in the interest of the public health and for the prevention of fraud.

Moreover, it is to be remembered that we are dealing here with a profession, and not a business. True, men make their living by the one as by the other, but the entirely legitimate methods by which a merchant builds up his business may be objectionable and fruitful of evil if employed by the members of a profession. It is to the interest of the public that the standard of character of those practicing a profession be kept as high as possible. To this end efforts are made by boards charged with the duty of determining the fitness of applicants for admission into the various learned professions to exclude all those who are undesirable from the standpoint of character. It would be a legitimate concern of the State to make a profession as unattractive as possible for those who look upon that profession as purely a money-making pursuit, and are little mindful of the important duties, binding in conscience and rarely enforceable by coercive measures, which they assume when they are licensed by the state to practice one of the healing arts.

The legislation now under attack only indirectly regulates the practice of dentistry. Directly, it is a limitation on the means by which the dentist may attract patrons to his office. It is a prohibition on advertising for patients by the dentist proclaiming his superior merits, and in the other ways specified in the statute. It may be that the Legislature enacted into law what was formerly only a code of ethics, but that fact by itself would not make it repugnant to constitutional guarantees, if the code of ethics reasonably tends to promote a legitimate legislative object.

It is my opinion, having in mind the nature of the privilege which the dentist enjoys at the hands of the state, the character of the relationship between dentist and patient and the direct interest of the state in the profession of dentistry and in the standards of honesty and devotion to duty to be observed by its members, that the Legislature, in the exercise of the police power and particularly that phase of it which relates to the public health and the

prevention of fraud, has not violated rights guaranteed to the plaintiff by the constitution of this State or the United States in enacting the legislation now challenged.

It may be that the plaintiff has never, as he claims, departed from the strict truth in his advertisements. It may be that he is as skillful and competent and careful as he asserts. But, the Legislature is not for that reason limited to the prohibition of only false or misleading advertisements. The additional opportunity which advertising of the alluring and braggadocio type gives to the unscrupulous dentist to beguile gullible people into his office and fleece them, may well have induced the Legislature to believe that the existing legislation was not adequate for the purpose for which it was enacted, and the court cannot say that the Legislature was without good grounds for that belief. The commercializing and degredation of an honorable profession which may easily result from unrestrained advertising by illegitimate and unconscionable methods which are easily practiced but with the utmost difficulty can be proved and prevented, were no doubt considerations which impelled the Legislature to the action which it took. These are evils which are a proper subject of legislative concern, and which the enactment would tend to correct.

The Supreme Court of Washington in the case of Laughney v. Maybury, 145 Wash. 146; 259 Pac. 17; 54 A. L. R. 893, sustained the validity of a similar law with relation to osteopaths. The Colorado court in the case of Chenoweth v. State Board of Medical Examiners, 141 Pac. 182, held unconstitutional a statute which prohibited the publication and circulation by a physician of advertisements relative to any disease of the sexual organs. If some of the principles announced in the opinion in the Chenoweth case are to be followed, then the law here in question must be declared invalid, but the Colorado court took no account of what seems to me to be controlling considerations based on the fact that the law dealt with a learned profession. Moreover, there are, in my opinion,

obvious grounds of public policy which justify a law prohibiting the advertising of remedies for sexual diseases, whether by physicians or any one else. I do not deem it necessary to refer to any of the numerous other authorities cited in the exhaustive briefs of counsel. I have read them with care. I think the Washington decision expresses the correct rule of constitutional law to be applied to this case.

The contention that the act is discriminatory because it applies only to dentists, and not to physicians and other professions, cannot be sustained. Neither due process of law nor the equal protection of the laws is denied

> "when a law is founded on some natural basis of classification and all persons within its scope are treated alike under similar circumstances." McGehee on Due Process of Law, p. 312.

As the author says:

> "When regulations are imposed upon one trade or business on valid grounds, it is not a subject of complaint that other kinds of business are not subject to like regulations."

Here, the legislature was dealing with the subject of the practice of dentistry. It was not required to enact similar legislation for other professions in order to avoid the charge of discrimination.

It is further urged that some of the provisions of the law are so vague that they are void for indefiniteness and uncertainty; and that the statute is void for want of a proper title. As to the former contention, it is sufficient to say that plaintiff alleges in his Complaint that he is doing the very things concerning which he makes the objection of uncertainty. As to the title, the contention is that the word "misconduct" in the title of the 1913 Act (Chapter 358, Laws 1913) and which may be said to be incorporated in the title to the 1933 Act, is not broad enough to cover the acts included in the definition of unprofessional

conduct in the 1933 Act, and, therefore, that the title does not conform to Article 4, Section 20, of the State constitution which provides:

> "Every act shall embrace but one subject, and matters, properly connected therewith, which subject shall be expressed in the title * * *."

Passing the question as thus presented, it seems to me that inasmuch as the title of the 1933 Act contains the words "relating to the practice of dentistry," the contention of the plaintiff in this particular is without merit.

In concluding this brief statement of the reasons which have led me to hold this act to be a valid exercise of the police power, I refer again to those allegations of the plaintiff's Complaint wherein it is stated that he and his assistants are treating one hundred and fifty (150) persons daily, and that this large volume of business will be destroyed or substantially impaired if the plaintiff is not permitted to advertise in the future as he has in the past. The plaintiff thus admits that he is unable either to secure a large number of patients or to hold them by his skill and ability alone, but that advertising of the kind denounced by the statute as unprofessional conduct is essential to his financial success. The picture thus graphically painted of an honorable profession thoroughly commercialized suggests a situation that impelled the Legislature to the adoption of this Act. If so, the court cannot say that that body was not justified in the course that it took.

The demurrer to the complaint will, therefore, be sustained.

The plaintiff will have five days in which to file an amended complaint, and the application of the plaintiff heretofore made for leave to amend the complaint by alleging a defect in the title of the Act will be allowed, so that this question can be carried to the Supreme Court, if it is so desired.

(Signed) HALL S. LUSK, *Judge*.

APPENDIX C.

MISCELLANEOUS STATUTES CONCERNING ADVERTISING

ARIZONA: *Attorneys*—"for any other unprofessional or unethical conduct, violative of the canons and ethics of the profession of an attorney at law as adopted by the *American Bar Association.*" *Physicians and Surgeons*—"All advertising of any medicine or of any means whereby the monthly periods of women can be regulated or the menses re-established if suppressed." Arizona Code 1928, Secs. 201 and 2559 and 4761.

CALIFORNIA: *Dentistry*—By an Act approved by the Governor April 18, 1933, being Chapter 84, the Legislature added the following to Subdivision 3 of Section 13: "practicing or accepting or receiving any commission or rebating in any form or manner on fees for professional services; radiograms, prescriptions, or other services or articles supplied to patients."

COLORADO: *Physicians and Surgeons*—"Causing the publication, circulation, exhibition or display publicly of any advertisements, notice or information of any medicine or means whereby the monthly periods of women can be regulated, or the menses, if suppressed, can be re-established, or whereby an abortion can be accomplished; causing the publication, circulation, exhibition or display publicly of an advertisement relative to any disease of the sexual organs or relative to the treatment, alleviation, palliation, cure or prevention of any disease, weakness or condition of the sexual organs such as prejudicially to affect public morals." Colorado Code of 1927, Sec. 6855.

DELAWARE: *Dentistry*—"In using or advertising as using any drug, nostrum, or patent proprietary medicine of an unknown formula or any dangerous or unknown anesthetic which is not generally used by the dental profession."

"Or using or advertising as using any drugs, material, medicine, formula, system or anesthetic which is either falsely advertised, misnamed or not in reality used."

"10. That the holder thereof has advertised either by sign or printed advertisements under the name of a corporation, company, association, parlor or trade name."

"11. That the holder thereof has used or advertised to use any drug, nostrum, or patent proprietary medicine of any unknown formula, or any dangerous or unknown anesthetic which is not generally used by the dental profession, or uses or advertises to use any drugs, materials, medicine, formula, system or anesthetic which is either falsely advertised, misnamed or not in reality used." Laws 1933, Chap. 48.

GEORGIA: *Physicians and Surgeons*—"Causing the publication and circulation of an advertisement of any medicine by means whereby the monthly periods of women can be regulated, or the menses, if suppressed, can be re-established; causing the publication and circulation of an advertisement relative to any disease of the sexual organs." Code of 1926, Sec. 1697 (13).

IDAHO: *Dentistry*—"Advertising as practicing dentistry under the name of a company, association, corporation, trade or business name unless such name shall contain the names of all dentists practicing under such name and no other name or names."

"advertising as using any drugs, medicines, materials, formula, system or anesthetic which is either falsely advertised, misnamed, or not in reality used."

Physicians and Surgeons, Idaho Code 1932, Secs. 53-1315: "Practicing medicine and surgery, or any branch thereof, under a false or assumed name, or practicing or advertising as practicing medicine and surgery or any branch thereof, under the name of a company, association, corporation, trade name or business name, unless such name shall contain the name of all persons licensed to practice under this chapter and no other name or names." Idaho Code 1932, Sec. 53-2107.

INDIANA: *Dentistry*—The applicant cannot be admitted to practice in case of "the failure of the applicant to pursue and complete a satisfactory course of dental and pre-dental studies." Chap. 169, Laws of 1931.

KENTUCKY: *Dentistry*—"Advertise to use any drug, nostrum, patent or other proprietary drug or medicine of unknown formula." Carroll's Kentucky Statutes of 1930, Sec. 2636-6.

LOUISIANA: "Advertising special ability to treat or cure chronic or manifestly incurable disease."

MARYLAND: *Dentistry*—(Maryland State Dental Law, 1933)—"Advertising of the use of any drug, nostrum, patent or proprietary medicine of any unknown formula or to advertise any system of anesthetics which is unnamed or not in reality used."

"No corporation shall display any signs or advertise in any manner, except in the names of the duly licensed dentists practicing dentistry in connection with said corporation, and all corporations,

individuals or groups of dentists are hereby expressly prohibited from using in the practice of dentistry any parlor or trade name or display any sign or advertisement of any parlor or trade or assumed name under which the business may be conducted." Chap. 564, Laws 1933.

MICHIGAN: *Dentistry*—"Attract or attempt to attract any person on the public streets by means of any public demonstration of any phase of dental surgery." Vol. 2, Compiled Laws 1929, Sec. 6773.

MISSOURI: *Dentistry*—"in using, or advertising as using, any drug, nostrum or patent proprietary medicine of any unknown formula or by dangerous or unknown anesthetic which is not generally used by the dental profession, or using, or advertising as using, any drugs, material, medicine, formula, system or anesthetic which is either falsely advertised, misnamed or not in reality used or which has not the sanction and approval of the dental and medical sciences." Sec. 13566, Revised Statutes 1929.

NEBRASKA: *Physicians and Surgeons—"Division of fees* or agreeing to split or divide the fees received for professional services with any person for bringing or referring a patient or assisting in the care or treatment of a patient without the consent of said patient or his legal representative." Compiled Statutes 1929, Sec. 71-602.

NEW YORK: *Dentistry*—"The employment of letters, handbills, posters, circulars, cards, stereopticon slides, motion pictures, radio, newspapers or other advertising devices for the purpose of soliciting patronage, except that a dentist may use personal professional cards of a modest type announcing his name, title, address, telephone number and office hours." (Rule 8 adopted by the Board of Regents governing dental advertising.)

NORTH CAROLINA: *Dentistry*—Session Laws 1933, Page 395. By Chapter 270, Laws 1933, the Legislature amended Section 6649 by adding as a ground for revocation: "has by himself or another solicited professional business."

OHIO: *Physicians and Surgeons*—"Where specific mention is made in such advertisements of tuberculosis, consumption, cancer, bright's disease, kidney disease, diabetes or of venereal diseases or diseases of the genito-urinary organs." Throckmorton's Annotated Code 1930, Vol. 7, Sec. 1275.

PENNSYLVANIA: *Dentistry* — which, among other things, contains the following: "or of unprofessional conduct; or of false, misleading or deceptive advertising, as respects the skill of the operator, the quality of materials, drugs or medicines used, or methods practiced." 1933, May 1, P. L. 216, Sec. 5.

SOUTH CAROLINA: *Dentistry*—"advertise as using any drug, nostrum, patent or proprietary medicine of unknown formula, or any dangerous or unknown anesthetic, which is not generally used by the dental profession." Code of Laws 1931, Sec. 5210.

SOUTH DAKOTA: *Dentistry* — "Advertising to practice, offering to practice, or holding himself out as practicing dentistry or dental surgery under a fictitious name, corporate or trade name, unless the name of such practitioner shall appear as part of such advertisement and in at least nonpareil type." Compiled Laws 1929, Sec. 7751.

TENNESSEE: *Dentistry*—"Advertise to use any drug, nostrum, patent or dangerous or unknown anesthetic or one not generally in use by the dental

profession, or shall advertise to use any drug, medicine, formula, system, or anesthetic which is" Michie's Code 1932, Sec. 6948.

UTAH: *Physicians and Surgeons*—"Advertising, announcing, or stating, directly, indirectly, or in substance, by any sign, card, newspaper, advertisement or other written or printed sign or advertisement, that the holder of any certificate issued under this act, or any other person, company or association by whom he is employed or in whose service he is, will cure or attempt to cure, or will *treat*, any person or persons for lost manhood, sexual weakness or sexual venereal disease, or will cure or attempt to cure or *treat* any disorder, or any disease of the sexual organs, or being employed by, or being in the service of any person, firm, association or corporation so advertising, announcing or stating."

UTAH: *Physicians and Surgeons*—"Street advertising, soliciting or other public peddling or selling of medical or surgical remedies, appliances in person or by proxy." Laws 1921, Chap. 91.

SUPREME COURT OF THE UNITED STATES.

No. 538.—October Term, 1934.

Harry Semler, Appellant, *vs.* Oregon State Board of Dental Examiners, L. A. Rosenthal, Leonard R. Andrews, et al., etc.	Appeal from the Supreme Court of the State of Oregon.

[April 1, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case presents the question of the validity of a statute of the State of Oregon, enacted in 1933, relating to the conduct of dentists. Oregon Laws, 1933, Chapter 166. Previous legislation had provided for the revocation of licenses for unprofessional conduct, which, as then defined, included advertising of an untruthful and misleading nature. The Act of 1933 amended the definition so as to provide the following additional grounds for revocation:

"advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly".

Plaintiff, a dentist practicing in Portland, Oregon, brought this suit in the state court against the members of the State Board of Dental Examiners to enjoin the enforcement of the statute, alleging that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and impaired the obligation of contracts in violation of Section 10, Article I, of the Constitution of the United States. The circuit court, overruling this contention, sustained a demurrer to the complaint and, upon the refusal of plaintiff to plead further, the suit was dismissed. On

appeal, the Supreme Court of the State took the same view of the federal question and affirmed the judgment. 34 Pac. (2) 311. The case comes here on appeal.

Plaintiff alleged in his complaint that he was licensed in 1918; that he had continuously advertised his practice in newspapers and periodicals, and by means of signs of the sort described in the amended statute, and that he had employed advertising solicitors; that in his advertisements he had represented that he had a high degree of efficiency and was able to perform his professional services in a superior manner; that he had stated the prices he would charge, had offered examinations of prospective patients without charge, and had also represented that he guaranteed all his dental work and that his dental operations were performed painlessly. He further alleged that the statements in his advertisements were truthful and were made in good faith; that by these methods he had developed a large and lucrative practice; that through long training and experience he had acquired ability superior to that of the great majority of practicing dentists; that he had been able to standardize office operations, to purchase supplies in large quantities and at relatively low prices, and thus to establish a uniform schedule of charges for the majority of operations; also that he had made contracts for display signs and for advertisements in newspapers, and had entered into other engagements, of which he would be unable to take advantage if the legislation in question were sustained, and, in that event, his business would be destroyed or materially impaired.

Plaintiff is not entitled to complain of interference with the contracts he describes, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State. His contracts were necessarily subject to that authority. *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 363; *Union Dry Goods Co.* v. *Georgia Public Service Commission*, 248 U. S. 372, 375, 376; *Sproles* v. *Binford*, 286 U. S. 374, 391; *Stephenson* v. *Binford*, 287 U. S. 251, 276. Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each. We

find no basis for the charge of an unconstitutional discrimination. *Watson* v. *Maryland*, 218 U. S. 173, 179; *Miller* v. *Wilson*, 236 U. S. 373, 384; *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40, 43; *Dr. Bloom, Dentist, Inc.* v. *Cruise*, 288 U. S. 588.

The question is whether the challenged restrictions amount to an arbitrary interference with liberty and property and thus violate the requirement of due process of law. That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. *Douglas* v. *Noble*, 261 U. S. 165; *Graves* v. *Minnesota*, 272 U. S. 425, 427. The State may thus afford protection against ignorance, incapacity and imposition, *Dent* v. *West Virginia*, 129 U. S. 114, 122; *Graves* v. *Minnesota, supra*. We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals (*Miller* v. *State Board of Dental Examiners*, 90 Colo. 193, 287 U. S. 563), and that it may prohibit advertising that tends to mislead the public in this respect. *Dr. Bloom, Dentist, Inc.* v. *Cruise*, 259 N. Y. 358, 363; 288 U. S. 588.

Recognizing state power as to such matters, appellant insists that the statute in question goes too far because it prohibits advertising of the described character, although it may be truthful. He contends that the superiority he advertises exists in fact, that by his methods he is able to offer low prices and to render a beneficial public service contributing to the comfort and happiness of a large number of persons.

The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods "to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them". The legislature was aiming at "bait advertising". "Inducing patronage", said the court, "by representations of 'painless dentistry', 'professional superiority', 'free examinations', and 'guaranteed' dental work" was, as a general rule, "the practice of the charlatan and the quack to entice the public".

We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

It is no answer to say, as regards appellant's claim of right to advertise his "professional superiority" or his "performance of professional services in a superior manner", that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement. *Booth* v. *Illinois*, 184 U. S. 425, 429; *Purity Extract Company* v. *Lynch*, 226 U. S. 192, 201; *Hebe Company* v. *Shaw*, 248 U. S. 207, 303; *Pierce Oil Corporation* v. *Hope*, 248 U. S. 498, 500; *Euclid* v. *Ambler Company*, 272 U. S. 365, 388, 389.

The judgment is affirmed.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.